SUPREME COURT, U. S.

FEB 29 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant,

—against—

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. McCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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NATIONWIDE MUTUAL INSURANCE COMPANY,
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—against—

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The appellant, Nationwide Mutual Insurance Company ("Nationwide"), pursuant to United States Supreme Court Rules 13(2) and 15, files this, its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order of the three judge court below, denying an interlocutory and permanent injunction and dismissing the complaint, and should exercise such jurisdiction in this case.

Opinion Below

The district court rendered a written opinion,* which opinion is reported at 265 F. Supp. 556, and a copy of which is appended hereto as Appendix A.

Jurisdiction

The appeal herein is from a final order and decree made and entered by the United States District Court for the Southern District of New York specifically constituted and convened under 28 U.S.C. §§ 2281 and 2284 upon the plaintiff's application for an interlocutory and permanent injunction to restrain the enforcement, operation, or execution of a statute of the State of New York, to wit, a part of §§ 5201 6202, and Rule 320, of the Civil Practice Law and Rules of the State of New York, for repugnance to the Fourteenth Amendment to the Constitution of the United States.

The final order and decree appealed from was made and entered on March 17, 1967. Notice of Appeal was filed in the United States District Court for the Southern District of New York on April 17, 1967. On June 15, 1967 an order was entered, by consent, in said Court extending the appellant's time to docket the appeal in this Court to and including December 31, 1967. On December 28, 1967 counsel for all parties signed a stipulation consenting to the entry of an order further extending the appellant's time to docket said appeal to March 15, 1968. On January 4, 1968 an order was entered in the Supreme Court of the United States by the Honorable John M. Harlan, one of the Associate Justices of the Court, extending the appellant's time to docket the appeal to and including February 29, 1968.

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* And order.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final order and decree complained of by virtue of the provisions of 28 U.S.C. §§ 1253 and 2101(b).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the final order and decree on direct appeal in this case:

Moody v. *Flowers,* 387 U. S. 97, 87 C. Ct. 1544, 18 L. Ed. 2d 643 (1967).

Mayo v. *Lakeland Highlands Canning Co.,* 309 U. S. 310, 316 S. Ct. 517, 84 L. Ed. 774.

American Federation of Labor v. *Watkins,* 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873.

The statute of the State of New York that is involved is the New York Civil Practice Law and Rules (McKinney's Consolidated Laws of New York, Vol. 7B., hereinafter sometimes referred to as "CPLR"); and more particularly §§ 5201 and 6202, and Rule 320* thereof, as the same have been interpreted and applied by the Court of Appeals of the State of New York in *Seider* v. *Roth,* 17 N. Y. 2d 111 (1966) and more recently in *Simpson* v. *Loehmann,*** —— N. Y. 2d ——, and *Victor* v. *Lyon Associates, Inc.,* —— N. Y. 2d —— (both decided on December 29, 1967).

Section 6202 provides in part that:

> "Any debt or property against which a money judgment may be enforced as provided in Section 5201 is subject to attachment."

Section 5201 deals with enforcement of money judgment. It provides in pertinent part as follows:

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* See Appendix B for complete text of applicable CPLR sections and rules.

** See Appendix C for text of *Simpson* opinions.

"(a) *Debt against which a money judgment may be enforced.* A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

"(b) *Property against which a money judgment may be enforced.* A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. . . ."

The Court of Appeals of the State of New York decided in *Seider* v. *Roth*, 17 N. Y. 2d 111 (1966) that the obligation of the insurance carrier under its automobile liability policy to defend any action brought against its insured was a "debt" within the meaning of the aforesaid § 5201(a), and thus attachable under § 6202, and that the situs of the debt was in New York, even though the policy was issued in Canada to a Canadian resident, since the insurance carrier was doing business in New York. The result of this holding was to allow the courts of New York to assume jurisdiction over an action brought by a resident of New York when he sustained injuries in a collision with the Canadian's car in Vermont.

However, if the jurisdictional basis is constitutional, there would seem to be no prohibition against the New York courts assuming jurisdiction over any personal in-

jury action, regardless of where it occurred, or whether, as in this case, the parties were both nonresidents of New York, as long as the defendant's insurance carrier was authorized to do business in New York.

Nationwide's and its insurers' predicament is further complicated by the provisions of Rule 320 of the Civil Practice Law and Rules.

Under the attachment proceedings described above, the claimants do not obtain personal jurisdiction over the policyholder. At most, they obtain *quasi in rem* jurisdiction under the provisions of CPLR § 314:

> "314. *Service without the state not giving personal jurisdiction in certain actions.* Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:
>
> . . . . .
>
> 3. Where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment . . ."

However, if any defense is made to such action, other than an attack on jurisdiction, the policyholder will be deemed to have appeared in the action and will become personally liable for any judgment rendered in excess of the insurance coverage if the jurisdictional defense is unsuccessful. This result ensues because of the provisions of CPLR Rules 320 and 3211. Rule 320 reads as follows:

> "R. 320. *Defendant's appearance*
>
> "(a) *Requirement of appearance.* The defendant appears by serving an answer or a notice of ap-

pearance, or by making a motion which has the effect of extending the time to answer . . .

"(b) *When appearance confers personal jurisdiction, generally.* Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.

"(c) *When appearance confers personal jurisdiction,* in certain actions. In a case specified in section 314 where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted by motion or in the answer as provided in rule 3211, *unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.*" (Emphasis supplied.)

Paragraphs eight and nine of Rule 3211(a), CPLR, refer to grounds for dismissal of complaints because the court lacks jurisdiction of the person of the defendant (par. 8) or because the court "has not jurisdiction in an action where service was made under section 314 or 315." This latter provision is intended to permit challenges to jurisdiction over the *res* in cases of *in rem* or *quasi in rem* actions. See Weinstein, Korn & Miller, New York Civil Practice §§ 3211.21, 3211.22.

Thus, in these attachment cases, the policyholder may only defend on the merits without making a personal appearance, *if* his challenge to the attachment of the insurance policy is ultimately sustained on appeal. If he loses on this issue, as all insureds must now lose by virtue of the *Seider* and *Simpson* decisions *supra,* however, he will be personally liable for a judgment exceeding his policy coverage.

While this may not at first blush seem to cry out for correction, it can, and did in the instant case produce the following irreconcilable dilemma and conflict:

(1) The appellee, Lars Vaage, a Norwegian citizen, was allegedly struck while walking along a highway near Morehead City, North Carolina, by a car owned by Clinton A. Lewis, and operated by his infant son, Clinton James Lewis, both of whom were and are residents of the State of North Carolina;

(2) Mr. Vaage's papers alleged quite serious, permanent injuries, for which judgment in an amount in excess of $100,000 was demanded;

(3) By the terms of the policy which Nationwide issued out of its North Carolina office to Mr. Lewis, it undertook to pay only up to $10,000 of the total award;

(4) In order to defend the action on the merits, it would be necessary to make a personal appearance on Mr. Lewis' behalf which would subject him to personal liability in excess of the policy limits;

(5) New York verdicts and judgments in personal injury actions are notoriously substantially higher than those in North Carolina, and Mr. Lewis' personal attorney instructed Nationwide *not* to appear and subject him to personal liability;

(6) If Nationwide honored this instruction, it would have to allow the action to go by default and thus forfeit, in this instance, the full amount of its $10,000 policy;

(7) If it violated its insured's instruction, it might conceivably be held liable for the full amount of any judgment obtained against him, in either event producing a result which was contrary to the terms and provisions of the insurance policy;

(8) Other claimants had already resorted to such attachment procedure against Nationwide and other insurance companies, as well, and many more were threatening to do so. As indicated above, any injured person was apparently eligible to use the procedure.

Nationwide thus sought to invoke the aid of the District Court to enjoin Mr. Vaage from continuing to prosecute an action in the New York state courts pursuant to the aforesaid attachment procedure, in violation of its and its insured's constitutional rights, and to enjoin sheriffs throughout the State of New York from executing orders of attachment upon automobile insurance policies issued by it, except those issued to residents of the State of New York.

The three judge statutory district court denied the injunction and dismissed the complaint on the ground that there had been no showing that there was any state official who was denying or threatening to deny the plaintiff's constitutional right; and that to enjoin sheriffs from levying orders of attachment in the future would be tantamount to enjoining "proceedings in a State court" which relief the Federal courts were prohibited from granting under 28 USC § 2283.

Questions Presented

The principal questions presented are:

1. Whether the district court abused its discretion in denying an interlocutory injunction.

2. Whether 28 USC § 2283 prohibits a federal court from granting the relief requested in the instant case.

3. Whether §§ 5201 and 6202 and Rule 320 of the Civil Practice Law and Rules of the State of New York, as interpreted and applied by the Court of Appeals of the State of New York to accident insurance policies, violate the United States Constitution.

Statement of the Case

The instant action was commenced on September 16, 1966 by the issuance of an order requiring the defendants to show cause why a three-judge court should not be convened and a temporary restraining order issued, pending the hearing of Nationwide's application for an interlocutory and permanent injunction, which order also provided for the service of the summons and complaint upon the defendants. The complaint alleged the following, in substance:

Nationwide is a corporation organized and existing under the laws of Ohio, where it maintains its principal office; it is authorized under the laws of Ohio to issue public liability insurance policies insuring against liability arising out of the ownership, maintenance and operation of motor vehicles. Nationwide is also licensed to sell insurance in New York, and to issue the aforesaid public liability insurance policies in that state. It maintains offices for the transaction of such business in the City of New York, and in other cities throughout the State of New York. The defendant-respondent, Lars Vaage, is a citi-

zen and resident of Norway, and the defendants-respondents, Clinton James Lewis and Clinton A. Lewis, are citizens and residents of the State of North Carolina.

On or about September 7, 1963 Nationwide issued insurance policy No. 61-802-157 to Clinton A. Lewis, then and now a resident of North Carolina, wherein and whereby it agreed "to defend any suit against the Insured" alleging bodily injury or property damage caused by the operation of the insured motor vehicle, and to pay up to $5,000 for or on account of property damage, and up to $10,000 for the injuries or death of any one individual, but not in excess of $20,000 for the injuries or death of all individuals arising out of any single accident, and that this policy was in full force and effect on December 31, 1963.

On December 31, 1963 the 1963 Pontiac motor vehicle owned by Clinton A. Lewis and insured under the aforesaid insurance policy was lawfully being operated by Clinton James Lewis, the infant son of Clinton A. Lewis, in the vicinity of Morehead City, State of North Carolina, when an alleged contact occurred between said vehicle and Lars Vaage, a citizen of Norway.

On or about August 4, 1965 an order of attachment issued out of the Supreme Court of the State of New York, County of Queens, in an action entitled "Lars Vaage, Plaintiff, —against— Clinton James Lewis and Clinton A. Lewis, Defendants", Index No. 3329-1965 (hereinafter referred to as the "Vaage action"), which order authorized the Sheriff of any county in the State of New York to levy upon such property of Clinton A. Lewis, including debts due to him, as would satisfy the injuries claimed to have been sustained by the said Lars Vaage in the amount of $100,000.

On or about August 24, 1965 a deputy sheriff of the City of New York, and one of the subordinates of the defendant John J. McCloskey, purported to levy the order of attachment upon the interest of the said Clinton A. Lewis in the said insurance policy No. 61-802-157 issued by Nationwide, as aforesaid, by delivering a copy of said order of attachment to an employee of Nationwide in the City of New York.

Thereafter, on or about August 26, 1965 a copy of the summons in the aforesaid action was delivered to the said Clinton A. Lewis and Clinton James Lewis in North Carolina, and the said defendant-respondents thereafter notified Nationwide of the receipt of said summons, as required by the terms of said policy.

On or about September 23, 1965, in performance of its contractual obligations under said policy No. 61-802-157, Nationwide retained counsel for the said defendants Clinton James Lewis and Clinton A. Lewis, and a motion was made to vacate the said order of attachment and sheriff's levy on the ground, among others, that the said insurance policy No. 61-802-157 did not constitute an attachable property right under the laws of the State of New York.

Thereafter on or about November 18, 1965 an order was entered in the said Vaage action denying the motion to vacate the attachment, and an appeal was taken from said order to the Appellate Division, Second Department of the Supreme Court of the State of New York. Although this appeal has not yet been determined, it has become academic, since as stated above, the Court of Appeals of the State of New York subsequently upheld such attachments in the *Seider* case, and that neither Nationwide nor its insured had any remedy in the New York state courts.

The complaint then went on to allege that Nationwide had been instructed not to subject its insured to personal liability, and the resultant dilemma and conflict caused by such attachment procedure and the aforesaid sections and rules of CPLR, as referred to above.

In addition, the complaint alleged that on or about August 22, 1966 an order of attachment issued out of the Supreme Court of the State of New York, County of Ontario, in an action entitled "Josephine Monaco and Felix N. Monaco, individually and as parents of Michele Monaco, an infant of the age of 14 years, plaintiffs—against—Arthur Williams and Samuel C. Williams, defendants," Index No. 44580, and that pursuant to said order the Sheriff purported to levy upon another public liability policy issued by Nationwide to the defendant Samuel C. Williams, by delivering a copy of said order to an employee of Nationwide at its office in Syracuse, New York.

By the latter action (hereinafter sometimes referred to as the "Monaco action") Josephine Monaco and Felix N. Monaco, residents of the State of New York, seek to recover the sum of $15,000 for personal injuries sustained by the defendant Josephine Monaco, $1,000 for the personal injuries sustained by their infant daughter Michele Monaco, and $5,000 for the injuries, medical expenses and loss of her services sustained by Felix N. Monaco, as a result of a collision with a motor vehicle in Athens, Pennsylvania, which was owned by Samuel C. Williams and operated by Arthur Williams, both of whom were and are residents of the State of Pennsylvania. By the policy issued to the said Samuel C. Williams, Nationwide undertook to defend and to pay up to $10,000 for injuries or death to any one person, but not in excess of $20,000 for any one accident. The complaint went on to allege that Nationwide is and shall continue to be placed in the same

dilemma by the Monaco action, and subjected to the same deprivation and denial of its constitutional rights as it is in the case of the Vaage action unless and until Josephine Monaco and Felix N. Monaco are enjoined from prosecuting said action.

Finally, the complaint alleged that Nationwide has issued and outstanding, in the 49 states in which it is licensed to issue public liability insurance, policies identical or substantially similar to the policies which it had issued to Mr. Lewis and Mr. Williams, policies having aggregate policy limits in excess of $37,000,000,000; that aggregate annual premiums of approximately $140,000,000 are paid therefor, and that claims are being paid thereunder at the rate of approximately $91,500,000 per year. Of its aggregate business only approximately eight (8%) percent is attributable to the State of New York, on which annual premiums of approximately $18,700,000 are received, and annual claims of approximately $12,000,000 paid out.

In many of the 49 states in which it is licensed to do business, Nationwide maintains offices, and employs a substantial number of personnel, to transact such business, including the investigation, processing and payment of claims, and supervising the defense of legal actions brought against the insureds covered by said policies.

Nationwide's offices have been located and staffed with personnel on the basis of the volume of Nationwide policies issued to insureds in a particular area, and its past experience with the number and frequency of claims arising in and to be investigated, processed and paid in such area, which past experience demonstrated that most of such claims arose or were asserted in the area in which the accident occurred or the insured resided.

Moreover, in each of said states, the premiums charged for such policies as issued within each state vary in premium cost according to rates filed by Nationwide and approved by each of said states; that said rates are computed on the basis of prior losses and expenses incurred upon policies issued in said state where most of the accidents occur and where most of the accrued actions at law are governed by the law of said state. In addition a comparison premium rate schedule which accompanied the moving affidavits disclosed the great disparity among these rates, in general, and in particular that the insurance policy which was issued to Mr. Lewis in Morehead City, North Carolina for a semi annual premium of $38.90 would cost $150.60 semi annually if issued in Queens County, New York, where the Vaage action was brought.

Under the aforesaid laws of the State of New York as presently construed and interpreted, Nationwide could be compelled to defend all claims in the State of New York, irrespective of where the claim arose or the insured resided, at substantially greater cost and expense to Nationwide, which greater cost and expense it will forever be precluded from recovering, since the premiums on the policies with respect to which such claims could be asserted had already been computed and paid on the basis of different and substantially less cost and expense estimates.

The Sheriffs of the various counties of the State of New York are the only individuals authorized under the laws of the State of New York to levy writs and orders of attachment, including orders of attachment upon public liability insurance policies. For this reason, the complaint alleged, it had named as a party defendant John J. McCloskey, the Sheriff of the City of New York, William J. Rice, Jr., the Sheriff of the County of Albany*, and George F. Spike, the Sheriff of the County of Yates.*

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* Alphabetically speaking see these are "first" and "last" Counties in New York.

While each of the other fifty-six counties in New York has a Sheriff, it is impractical to bring them all before the Court. However, Nelson A. Rockefeller, the Governor of the State of New York, has the power and authority under the Constitution of the State of New York to remove the Sheriffs of all counties in the State for cause, and thus he was joined as representative of such other Sheriffs. Louis J. Lefkowitz is the Attorney General of the State of New York, and the public officer charged with the duty and responsibility, among others, of advising other public officers, including the said Sheriffs of their authority and duty under the laws of the State of New York, and was also joined herein as representative of such Sheriffs. The complaint as against the Sheriffs, concluded by alleging that Nationwide would continue to be irreparably damaged unless and until they were enjoined from levying attachments upon such insurance policies.

Finally, the complaint joined as a party defendant the New York Superintendent of Insurance on the ground that in his official capacity he had a valid and substantial interest in the litigation.

In its prayer for relief Nationwide sought, among other things:

> "A declaratory judgment that the laws of the State of New York with respect to the attachment or garnishment of property, including Sections 6201, et seq. of the Civil Practice Law and Rules, and those applicable to special and general appearances, including Rule 320 of the Civil Practice Law and Rules, are unconstitutional or otherwise illegal and improper and invalid, with respect to the attachment or garnishment of public liability insurance policies in that they, among other things, impair

the obligations of contracts, deprive the plaintiff and others of their property without due process of law, and interfere with interstate commerce, and particularly insofar as they fail to limit the jurisdiction of the courts of the State of New York to the policy limits set forth in said insurance policies, and fail to permit Nationwide and the insured to appear in and defend against claims arising under said policies without being deemed to have made a general appearance in said action and subjecting the insured, and perhaps Nationwide, to personal liability in excess of said policy limits."

". . .

"5. An injunction, permanently and pending the determination of this action, against all of the other defendants, and each of them, enjoining and restraining them from levying or attempting to levy, or of directing the levy of, any order of attachment or garnishment upon any public liability insurance policy issued by Nationwide unless the person insured under said policy is a resident of the State of New York, or the event of injury, damage or loss occurred in the State of New York; or of taking any other action with respect to said policies, pending the determination of this action."

Appearances were made on behalf of the defendants Lars Vaage, Sheriff McCloskey, of the City of New York, and by the Attorney General of the State of New York, on behalf of the Governor, himself and the Superintendent of Insurance, and on behalf of the Monacos. Their answers conceded, for the most part, the "factual" allegations of the complaint, denying, of course, that the attachment procedure was unconstitutional or otherwise il-

legal. There was no appearance on behalf of either the Lewises or the Williamses, Nationwide's insureds, although they both were personally served in their home states.

Thereafter, the action entitled "American International Underwriters Corporation, et al., Plaintiffs, —against— Carl S. Victor, et al., Defendants", number 66 Civ. 3389, was commenced in the same court. The complaint in that action was similar to the complaint in the instant action, and alleged that an automobile liability policy issued by the Hanover Insurance Co. of New York had been attached and used as a basis for jurisdiction in an action which had been commenced in the Supreme Court of the State of New York, County of New York, entitled "Carl S. Victor, plaintiff —against— Lyon Associates, Inc., et al., defendants" (which action is sometimes hereinafter referred to as the "Victor" case.)

Thereafter, the request for the temporary restraining order was denied and the three judge court was convened, and thereafter it permitted the four major insurance trade associations, i.e. American Insurance Association, American Mutual Insurance Alliance, American Foreign Insurance Association, and the National Association of Independent Insurers, of which all of the major insurance underwriters are members, to intervene as amicus curiae. After hearing argument, and receiving briefs, the three-judge court rendered its decision and final order, as aforesaid, dismissing the complaint. (Appendix A). The court below took great pains to note in its decision that the constitutional question had not been formally argued to the New York Court of Appeals in the *Seider* case, and it was decided among counsel to attempt to get either the *Vaage* case or the *Victor* case, or both, to that court as expeditiously as possible, and defer perfecting an appeal in the instant case until the New York Court of Appeals

had passed upon those constitutional questions. Due primarily to the fact that the *Vaage* and *Victor* cases originated in different judicial departments in the New York State system, the *Victor* case got to the Court of Appeals first and, of course, as stated above at page 3, was decided by that court at the same time it decided *Simpson* v. *Loehmann*.

The Questions Presented are Substantial

A. The Constitutional Question

The importance of the questions presented can best be illustrated by reviewing the various opinions of the Judges of the Court of Appeals of the State of New York in *Simpson* v. *Loehmann,* —— N. Y. 2d —— (decided December 29, 1967), and reproduced in full in Appendix C. That Court consists of seven judges, and the vote in the *Simpson* case was—on the surface at least—five to two, in favor of the constitutionality of insurance policy attachments. However, four of the seven judges of the court wrote opinions. Chief Judge Fuld wrote an opinion for the "Court", in which Judge Van Voorhis concurred, stating, *inter alia,* that such attachments were constitutional. Judge Keating wrote a separate concurring opinion to this effect. Judge Breitel wrote a separate opinion, in which he reasoned that such attachments were *unconstitutional,* but that he was voting with the rest of the Court, in order not to overrule the *Seider* case which the Court had so recently decided. Judge Bergan joined in this opinion. Judge Burke wrote a dissenting opinion, in which Judge Scileppi concurred, in which he found such attachments to be unconstitutional. Thus, the Court of Appeals, instead of voting five to two in favor of the constitutionality of such attachments, in reality has voted four to three *against* the constitutionality of these attachments. The

basic reason why such attachments are unconstitutional, as well as the authorities supporting such position, are fully set forth in the opinions of Judges Breitel and Burke, and it seems unnecessary to contribute to the length of this statement by amplifying them at this time. Suffice it to say that, if there ever was any doubt,[1] this attachment procedure is now valid in all respects, and will be invoked by claimants without reservation,[2] unless and until this Court acts.

The questions presented on this appeal are substantial ones and of utmost importance to both the parties hereto and to the insurance industry as well.

B. The Court Below Abused Its Discretion

The district court abused its discretion in denying the interlocutory injunction, and erred in dismissing the complaint.

For the very same reason that Nationwide has a direct appeal to this Court, it was properly before the three judge court. *Moody* v. *Flowers,* 387 U. S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967).

1. The complaint sought an interlocutory and permanent injunction to restrain "the enforcement, operation or execution of any State statute by re-

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[1] Appellants maintained unsuccessfully below that the New York Court of Appeals in upholding the "legality" of such attachments in its earlier decision in the *Seider* case, must be deemed to have also upheld their "constitutionality". Judge Breitel apparently agreed with this reasoning.

[2] It is believed that many claimants up to now had been hesitant to institute attachment suits in New York for fear that, in the event that the procedure was ultimately held invalid, the statute of limitations would bar suit in the proper forum.

straining the action of any officer[1] of such State in the enforcement of such statute . . ."

2. The statute sought to be enjoined was of "general and statewide application", and not local in character or application.

3. While the office of sheriff is somewhat local in character, they are nonetheless "functioning pursuant to a statewide policy and performing a state function."

Moreover, as stated by this Court in *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 S. Ct. 517, 84 L. Ed. 774, the question before the court below was whether Nationwide:

". . . raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."

Clearly, the complaint and moving papers met this test. The complaint raised the same constitutional questions as induced four of the seven judges of the New York Court of Appeals to reason that this attachment procedure was unconstitutional. Similarly, it amply demonstrated that there was no adequate remedy at law, and that the en-

[1] Sheriffs are the only officers authorized by the statute (CPLR § 6214) to execute orders of attachments, and thus they were the main defendants sought to be enjoined. Because of the difficulty and inconvenience of bringing all 57 sheriffs of the State before the court, the Governor and the Attorney General were joined as defendants, as representatives of the Sheriffs, since the former is authorized by the State Constitution to remove them and the latter official issues opinions as to the powers of public officers, which all such officers are required to obey.

forcement of the Act, pending final hearing, would inflict irreparable damages. The New York courts were bound to follow the decision of the Court of Appeals in the *Seider* case, and deny motions to vacate the attachments of insurance policies, thus confronting Nationwide and its insureds with the same dilemma of appearing or defaulting. Certainly, the fact that the appellant could have expended funds and continued up the New York appellate judicial ladder to attempt to convince the Court of Appeals to change its mind can hardly be said to afford an adequate remedy. More important, Nationwide was and is saying that neither it nor its insured is required to defend these cases in New York, and in incurring expenses in trying to avoid doing so, expenses which it cannot ever recover, it most assuredly is being irreparably damaged. Finally, Nationwide's complaint alleged that this attachment procedure threatened to irrevocably impair millions of dollars of its insurance policies, and to burden its interstate operations, in general. No one contended that these threats were lacking in substance. As this Court stated in *American Federation of Labor* v. *Watkins,* 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873:

> "The threat of multiplicity of prosecution which is here alleged would not alone be sufficient to establish a cause of action in equity (citing cases). But we mention the matter here to show that the threat of irreparable injury is real not fanciful, immediate not remote. The crux of the matter is the allegation that there is an imminent threat to an entire system of collective bargaining, . . . We conclude for that reason that the bill states a cause of action in equity."

Thus, even though the existence of the *Vaage* and *Monaco* actions (and the *Victor* case in the companion action), and

the threat of many more, may not alone have been enough to invoke the equity jurisdiction of the district court, still it was enough to lend credence to the contention that there was an "imminent threat to an entire system", namely interstate insurance, as equally important in its own right as collective bargaining.

C. Other Errors of the Court Below

While the district court may have been technically correct that it was prohibited under 28 U.S.C. § 2283 from enjoining the *Vaage* and *Monaco* actions which were pending in the New York courts, clearly it did not bar the relief which was sought against the sheriffs. As this Court stated in *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) at page 484, n. 2:

> "This statute (§ 2283) and its predecessor do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted."

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under 28 U.S.C. § 1253.

Respectfully submitted,

CHARLES G. PILLON,
Counsel for Appellant.

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2978
(Action No. 1)

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff,

—against—

—against—

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. McCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Defendants.

Appendix A

66 Civ. 3389
(Action No. 2)

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION and THE HANOVER INSURANCE CO. OF NEW YORK,

Plaintiffs,

—against—

CARL S. VICTOR, LYON ASSOCIATES, INC. and JOHN J. McCLOSKEY, Sheriff of the City of New York,

Defendants.

Before HAYS, C.J. and TYLER and TENNEY, D.J.J.

DUNNINGTON, BARTHOLOW & MILLER, New York, N. Y., by CHARLES G. PILLON, ESQ., and WILLIAM M. BRADNER, ESQ.,

Attorneys for Plaintiff Nationwide Mutual Insurance Co.

LEE, MULDERIG & CELENTANO, New York, N. Y., by PETER J. MALLOY, JR., ESQ.,

Attorneys for Plaintiffs American International Underwriters Corp. and Hanover Insurance Co.

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, by PHILIP KAHANER, Assistant Attorney General (JOEL LEWITTES, Assistant Attorney General, on the brief),

Attorney for Defendants Hon. Nelson A. Rockefeller, Hon. Louis J. Lefkowitz, Hon. Henry R. Stern, Jr.

Appendix A

SIDNEY POSNER, ESQ., New York, N. Y.,
Attorney for Defendant John J. McClioskey, Sheriff of the City of New York.

RAYMOND D. GAGE, ESQ., Geneva, N. Y.,
Attorney for Defendants Monaco.

STANLEY LIEBERMAN, ESQ., Brooklyn, N. Y., by SCHWARTZ, LEVITT & SOMMER (ARTHUR BLITZ, ESQ., on the brief), Brooklyn, N. Y.,
Attorney for Defendant Vaage.

GAIR & GAIR, New York, N. Y., by HERMAN SCHWARTZ, ESQ.,
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DOMAN, DUNN & ZUCKERMAN, New York, N. Y.,
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BOND, SCHOENECK & KING, Syracuse, N. Y.,
Attorneys for amicus curiae American Mutual Insurance Alliance.

ARANOW, BRODSKY, BOHLINGER, EINHORN & DANN, New York, N. Y.,
Attorneys for amicus curiae National Association of Independent Insurers.

TYLER, D.J.

Appendix A

This is a motion by plaintiff insurance companies[1] (hereinafter sometimes referred to as the "companies") for interlocutory injunctions against attachment and garnishment of the proceeds of insurance policies issued by the companies to certain non-resident policyholders.

Although the companies have their home offices elsewhere, they are qualified to do business in the State of New York. The defendants in Action No. 1 are the sheriffs of three counties in New York State, the Governor, the Attorney General and the Superintendent of Insurance of the State of New York, and the parties litigant in two personal injury actions which were commenced against various defendants who are insured by plaintiff Nationwide Mutual Insurance Company ("Nationwide"). The defendants in Action No. 2 are the parties litigant in a third personal injury action now pending in the New York courts and the Sheriff of the City of New York.

By their pleadings and other papers, the parties concede that the New York courts have ordered attachments of the insurance policies issued by plaintiffs, pursuant to the relevant New York attachment statutes, Civil Practice

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[1] Plaintiff American International Underwriters Corporation ("AIUC") is the "home-foreign manager" for some 13 American stock companies in a territory in the Far East. As such, its duties are to companies issuing foreign policies of insurance. The other two plaintiffs are stock companies which write and issue to the general public casualty insurance policies.

Appendix A

Law and Rules ("CPLR") Sections 5201 and 6202,[2] and that levies have been made by the defendant-sheriffs pursuant to these orders of attachment. Such attachments and resultant levies have occurred, it is agreed, as a result of a recent construction of the aforesaid statutes in relation to casualty insurance policies by the Court of Appeals of New York in a case entitled *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99 (1966). The companies argue strenuously that such application of the New York attachment statutes to the policies written by them is repugnant to their rights under Article I, Section 10 (impairment of contracts) and the Fourteenth Amend-

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[2] Section 6202 provides in part that:

> "Any debt or property against which a money judgment may be enforced as provided in Section 5201 is subject to attachment."

Section 5201 deals with enforcement of money judgments. It provides in pertinent part as follows:

> "(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.
>
> (b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment . . . ."

ment (deprivation of property without due process of law) of the Constitution.[3]

On October 26, 1967, a single judge of this court denied the companies' application for a temporary restraining order but, considering plaintiffs' constitutional arguments not entirely free from doubt, convened a three-judge court as prayed. 28 U.S.C. § 2281. The cases came on for hearing before the statutory court on January 27, 1967.

In their complaints, the companies allege that in all three personal injury actions, the complainants seek damages in excess of the applicable policy limits. Further, it is stated that the defendant policyholders have notified the companies that no steps should be taken by the latter to subject the former to *in personam* jurisdiction of the courts of the State of New York. In the view of the companies, these circumstances impose various obligations upon them either not contemplated by the insurance contracts or not permitted by their terms. It is also asserted that the levies by the defendant-sheriffs have brought into play the provisions of CPLR Section 6214,[4]

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[3] The companies also suggest that the New York attachment statutes as applied by the *Seider* case constitute an unreasonable burden on interstate commerce. As we read their briefs, however, this argument has not been sufficiently developed here, except perhaps, in the brief of one of the amici curiae; moreover, at this stage, consideration of such a contention, in our view, is not necessary to disposition.

[4] In particular, this statute provides: "The garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court . . . ."

which, according to counsel for the companies, prohibit the insurers from "taking any action to retain counsel for (their policyholders) or from incurring any obligation for (the policyholders') defense".

In their complaints and motion papers, plaintiffs seek interesting and drastic relief, the nature of which warrants summarization, particularly in relation to our view of this case to be discussed hereinafter. Essentially, the companies pray for:

1. A declaratory judgment "settling and declaring" the rights and obligations under the insurance contracts;

2. A declaratory judgment that the relevant New York attachment statutes as applied by the Court of Appeals in *Seider* v. *Roth, supra,* and CPLR Rule 320,[5] dealing with the nature and effects of appearances by parties litigant in New York courts, are unconstitutional with respect to casualty insurance policies such as those issued by the companies;

3. Alternatively, in the event that this court believes that the New York statutes as construed and applied by the *Seider* court are constitutional, a declartory judgment that the companies are authorized to enter general appearances in the courts of New York on behalf of their non-resident policyholders;

4. An order enjoining the companies' policyholders from taking any other and independent action in respect to the personal injury claims asserted against them; and

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[5] In essence, the companies maintain that Rule 320 must be construed to mean that any defense other than the jurisdictional defense by or for the policyholders in these cases will constitute a general appearance by such policyholders.

5. An order enjoining the defendant-sheriffs from taking any further action respecting the policies here in issue and from levying upon any attachment of any other policy issued by the companies to a non-resident of the State of New York.

As already indicated, the companies bottom their claims for relief upon a number of constitutional arguments, which can be fairly described in somewhat more detail as follows: First, it is said that each attachment "impounds" the contractual right and duty of the insurer to defend the policyholder and thus either deprives the issuing company of a hearing on the question of liability or subjects it to possible double payment of the cost of defense. Second, it is claimed that the attachments constitute direct actions by the plaintiffs in the personal injury suits against the companies in plain contravention of the policy terms. Finally, we are told that the companies are denied due process of law in that their policyholders are permitted to default at the companies' expense in derogation of the policy provisions.

To understand the companies' arguments and to foreshadow the reasons why this court concludes that the cases before us must be dismissed, it may be helpful to outline the status and procedural history of the three personal injury actions which are the subjects of the complaints.

The Vaage Action: On December 31, 1963, an auto owned by defendant Clinton A. Lewis and driven by co-defendant Clinton James Lewis, his son, allegedly struck and injured Lars Vaage, a citizen and resident of Norway, in North Carolina. The Lewis defendants, both residents of North Carolina, were insured under a policy issued by Nation-

wide in that state. The policy limits are $5,000 for property damages, $10,000 for injuries or death of any one individual and a maximum of $20,000 for injury or death of all individuals involved in a single accident. In August, 1965, Vaage filed a summons and complaint in the Supreme Court of New York, Queens County, against the Lewis defendants, alleging damages of $100,000. An order of attachment was issued by that court and served upon Nationwide in the City of New York. Personal service was thereafter effected upon the Lewises in North Carolina. The sheriff having jurisdiction levied pursuant to the attachment, and Nationwide made a prompt motion in the New York court to vacate the order of attachment. This motion was denied by an order entered on November 18, 1965. An appeal from that order is presently pending in the Appellate Division, Second Department. Further proceedings under the order of attachment, however, were stayed by the New York appellate court pending resolution of the appeal.[6] In September, 1966, the Lewis defendants instructed Nationwide to take no action on their behalf which would subject them to *in personam* jurisdiction of the New York courts.

The Monaco Action: In September, 1964, Mr. and Mrs. Monaco and their daughter were injured in an automobile collision in Pennsylvania. Involved in the collision was an automobile owned by defendant Samuel C. Williams and operated by defendant Arthur Williams. The Monacos are residents of the State of New York. The Williams defendants are residents of the State of Pennsylvania. An insurance policy had been issued by Nation-

[6] This stay, in our view, is not such as would require stay action on our part as contemplated by 28 U.S.C. § 2284(5).

wide in Pennsylvania to defendant Samuel C. Williams. The policy limits are for up to $10,000 for injury or death of any one person but not in excess of $20,000 for all persons involved in any one accident. In August, 1966, the Monacos commenced an action against the Williams defendants by filing a summons and complaint in the Supreme Court of New York, Ontario County. They also obtained an order of attachment which was served upon Nationwide at its Syracuse, New York office. Like the Vaage action, the Monaco action alleges damages in excess of the applicable policy limits. It does not appear that any appearance has been served by or on behalf of the Williams defendants in the Monaco action.

The Victor Action: In December, 1965, Carl S. Victor allegedly sustained personal injuries at Da Nang, South Viet Nam as a result of a collision between a motorcycle driven by him but owned by one George S. Bishop and a truck owned by Lyon Associates, Inc., and driven by a Lyons employee named Drysdale. Thereafter, Victor commenced an action against Lyon Associates, Inc., and Drysdale in the Supreme Court of New York, County of New York, for $750,000, an amount far in excess of the $20,000 limit of the policy issued to Lyon Associates by plaintiff the Hanover Insurance Company of New York ("Hanover"). In August, 1966, Victor abtained an order of attachment and caused it to be served on Hanover and AIUC. The latter firms moved to vacate the attachment. The Supreme Court of New York vacated it as to AIUC on the ground that the latter corporation was not the issuer of the policy in question. However, expressly relying upon the decision of *Seider* v. *Roth*, that court refused to vacate the attachment against Hanover. The policyholder, Lyon Associates, Inc., is a Maryland cor-

poration which apparently does no business in New York and is not qualified to do business here. Drysdale, Lyon's employee, apparently does not reside in New York. The record does not indicate of what state Carl S. Victor is a resident. It does appear that the sheriff of the City of New York has levied upon the policy issued by Hanover to Lyon Associates, Inc. Hanover, however, so far as we are told in the papers, has not appealed the decision of the Supreme Court of New York denying vacatur of the attachment order.

Although not especially relevant to our reasoning in disposing of these actions before us, a synopsis of the holding of the Court of Appeals of New York in *Seider* v. *Roth, supra,* will serve at least to partially explain the concern of the companies and the bases for their complaints.

In *Seider,* the two plaintiffs, husband and wife, were residents of New York. They alleged in their complaint that they were injured in an automobile accident in Vermont which occurred by reason of the negligence of the defendant, a resident of the Province of Quebec who was insured under a policy issued in Canada by Hartford Accident and Indemnity Company. Hartford was and is an insurer doing business in New York. The plaintiffs obtained an order of attachment which was served upon Hartford at its New York office.

Like the policies at issue here, the policy written by Hartford in the *Seider* case was typical and customary in form. It required Hartford to defend the policyholder in any automobile negligence action and, if judgment were rendered against the policyholder, to indemnify him therefor to the extent of the policy limits. The defendant-

insured made a motion to vacate the attachment; Sepcial Term of the trial court denied the motion. The Appellate Division affirmed Special Term but certified the question to the Court of Appeals.

As that court considered the matter, the "whole question" was "whether Hartford's contractual obligation to defendant is a debt or cause of action such as may be attached". 17 N. Y. 2d at 113. In an opinion by Chief Judge Desmond, the majority answered this question in the affirmative, reasoning that as soon as the accident occurred, there was imposed upon the insurance company a contractual obligation to defend which should be considered a debt within the meaning of CPLR Sections 5101 and 6202. In this connection, the court said, "the policy casts on the insurer several obligations which accrue as soon as the insurer gets notice of an accident, and whether or not a suit is ever brought". 17 N. Y. 2d at 113. With regard to the Hartford's argument that this ruling would amount to establishing a "direct action" against the insurer, the Court of Appeals conceded that this was true only to the extent that its ruling would place jurisdiction in New York State and require Hartford to defend here, "not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured". 17 N. Y. 2d at 114.

Apparently, none of the constitutional arguments advanced by the companies in this suit were urged before the Court of Appeals of New York. Moreover, the Court of Appeals was neither asked to nor did it make any specific rulings or observations with regard to the obligations of an insurance company *vis-a-vis* its insured, once jurisdiction has been obtained by the attachment statutes.

Appendix A

Defendants press a variety of arguments addressed to the merits of the companies' claims of deprivation of constitutional rights. Alternatively, defendants urge this court to abstain from exercising jurisdiction here until the New York courts resolve the various questions not answered in *Seider* v. *Roth*. But for an exclusionary rule or rules depriving us of jurisdiction here, as we will discuss hereinafter, we would be inclined to agree that the abstention doctrine would be appropriate. As the procedural histories of the three personal injury actions here involved indicate, the companies have yet to fully and fairly present their constitutional arguments to the New York courts at any level. More important, the various attachment orders and levies thereunder have done nothing to put the companies in the dire jeopardy which they here conjecture will soon befall them. There is no court ruling or order which has required the companies to "pay double" for the defense of their policyholders in the three suits in question. There has been no court ruling that the policyholders are legally entitled to ignore the plain provisions of the so-called cooperation clauses in the policies in question. Finally, no court has held that the attachments and levies thereunder prevent the companies from defending here in New York—in fact, the *Seider* court authorized and directed a defense under the circumstances here pertaining. In short, whatever the merits of their arguments, and assuming that no other jurisdictional infirmities are present, the companies have not shown that the existing state actions cannot be prosecuted with full protection of their constitutional contentions. See *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 501 (1941); *Government and Civil Employees Organizing Committee, CIO* v. *Windsor*, 353 U. S. 364 (1957);

England v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 420 (1964).

However this may be, we are convinced that both actions, insofar as they seek injunctive relief, must be dismissed for lack of jurisdiction. We do not reach the question of abstention in these cases because (1) the complaints do not state valid claims for relief within the purview of the three-judge court statutes, 28 U.S.C. §§ 2281 and 2284, and (2) such injunctive relief as the companies here seek is specifically barred by the anti-injunction statute, 28 U.S.C. § 2283.

In support of the first ground—that the complaints are wanting in equity (see *Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927, 928 (D. C. Mass. 1947)), it might be sufficient to observe that the state officials who are joined as party defendants are doing nothing which causes the constitutional infirmities of which the companies here complain. Not even the companies maintain that the Governor, the Superintendent of Insurance or the Attorney General of New York acte acted or can act to affect the rights asserted in the complaints before us. As their papers and arguments indicate, the defendant-sheriffs are the only state officials sought to be enjoined. The sheriffs, however, have done nothing to deny the companies due process or to require them to expend monies in excess of those required by their insurance contracts. What is more, any future action by the sheriffs would have to come about by virtue of a specific order of a New York court. See CPLR § 6214. We, of course, cannot assume that further orders of the New York courts will require any of the sheriffs who are parties here to act or fail to act in such a way as to deprive the companies of their constitutional rights. In short, there is no state agency or officer before this court to be

sensibly or effectively enjoined so as to afford the companies the relief for which they pray. Absent any basis for injunctive relief, this court loses all authority and power as a statutory three-judge court. 28 U.S.C. § 2281; see *Oklahoma Gas & Electric Co.* v. *Oklahoma Packaging Co.*, 292 U. S. 386 (1934); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 155 (1963); *Ex parte Bransford*, 310 U. S. 354, 361 (1940).

Put differently, there is substantial doubt in our minds "whether the complaint(s) at least, formally allege(s) a basis for equitable relief', not only as against the state officers therein named but also against all of the parties defendant. See *Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962). Since the state officials here joined as parties are not doing anything or cannot do anything directly to threaten irreparable injury to the companies, it follows that the complaints are wanting in equity—*i.e.*, that they do not state the facts sufficient to state valid claims for injunctive relief. See *Allegheny Airlines, Inc.* v. *Fowler*, 261 F. Supp. 508, 516 (S. D. N. Y. 1966).

What has already been said leads us to the second and absolute bar to these suits in this or any other federal court. In substance, the companies would have us enjoin further proceedings in the New York courts which have assumed jurisdiction of the personal injury actions giving rise to the complaints here. Congress, however, long ago enacted a statutory bar to any such interference by providing that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

28 U.S.C. § 2283;[7] see *Hill* v. *Martin*, 296 U. S. 393 (1935); *Kohn* v. *Central Distributing Co.*, 306 U. S. 531 (1939); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1940).

Joinder here of the sheriff-defendants as the principal state officials against whom the full force of federal injunctive power would apply does not avoid the prohibition of Section 2283. As Justice Brandeis long ago pointed out, that prohibition is directed against a stay of state court "proceedings" in the fullest sense of the word. "It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplimental or ancillary taken with a view to making the suit or judgment effective . . ." *Hill* v. *Martin, supra*, at 403. Clearly, the sheriff-defendants have acted and will act only as ministerial officers of the New York courts; as such, they cannot be enjoined by this court. *Carras et al.* v. *Monaghan*, 65 F. Supp. 658 (W. D. Pa. 1946); see *Kohn* v. *Central Distributing Co., supra*; *Leathe* v. *Thomas*, 97 Fed. 136 (7th Cir. 1899).

It follows, therefore, that this three-judge court must be dissolved and those portions of the complaints seeking injunctive relief, interlocutory and final, against the defendants who are state officials must be dismissed. Because a federal district court not sitting pursuant to Sections 2281 and 2284 of Title 28 of the United States Code may have jurisdiction of the remaining claims to the extent that they are grounded upon the declaratory judgment statutes, 28 U.S.C. §§ 2201 and 2202, we leave for resolution by a single

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[7] Formerly 28 U.S.C. § 265 of the Judicial Code. The exceptions set forth in the statute are in no way operative in the instance case.

judge the question, if and when seriously pressed, of whether or not such remaining claims should be dismissed.

It is so ordered.

PAUL R. HAYS
U. S. C. J.

HAROLD R. TYLER, JR.
U. S. D. J.

CHARLES H. TENNEY
U. S. D. J.

Dated: New York, N. Y.
March , 1967.

APPENDIX B

Provisions of Judicial Code (Title 28 U.S.C.) Relating to Three-Judge Courts

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§2101. Supreme Court; time for appeal or certiorari; docketing; stay

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or procedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appendix B

§2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

§2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in

such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

Pertinent Provisions of the New York Civil Practice Law and Rules (McKinney's Consolidated Laws of New York, Vol. 7B)

§6202. Debt or property subject to attachment; proper garnishee.

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 105 shall be construed to mean "defendant".

§5201. Debt or property subject to enforcement; proper garnishee.

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

(c) Proper garnishee for particular property or debt.

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person

holding it shall be the garnishee; except that in the case of a security which is transferable in the manner set forth in section 8-320 of the uniform commercial code, the firm or corporation which carries on its books an account in the name of the judgment debtor in which is reflected such security, shall be the garnishee; provided, however, that if such security has been pledged, the pledgee shall be the garnishee.

§6214. Levy upon personal property by service of order.

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody in the same manner as a summons except that such service shall not be made by delivery of a copy to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(b) Effect of levy; prohibition of transfer. A levy of service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, he owes a debt to the defendant or he is in the possession or custody of property in which he knows or has reason to believe the defendant has an interest, or if the plaintiff has stated in a notice which shall be served with the order that a specified debt is owed by the person served to the defendant or that the defendant has an interest in specified property in the possession or custody of the person served. All property in which the defendant is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, includ-

ing any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the defendant, shall be subject to the levy. The person served with the order shall forthwith transfer or deliver all such property, and pay all such debts upon maturity, to the sheriff and execute any document necessary to effect the payment, transfer or delivery. After such payment, transfer or delivery, property coming into the possession or custody of the garnishee, or debt incurred by him, shall not be subject to the levy. Until such payment, transfer or delivery is made, or until the expiration of ninety days after the service of the order of attachment upon him, or of such further time as is provided by any subsequent order of the court served upon him, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court. A garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at the direction of any person other than the defendant authorized to direct sale or transfer, provided that the proceeds in which the defendant has an interest be retained subject to the levy. A plaintiff who has specified personal property or debt to be levied upon in a notice served with an order of attachment shall be liable to the owner of the property or the person to whom the debt is owed, if other than the defendant, for any damages sustained by reason of the levy.

(c) Seizure by sheriff. Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.

(d) Proceeding to compel payment or delivery. Where property or debts have been levied upon by service of an order of attachment, the plaintiff may commence a special proceeding against the garnishee served with the order to compel the payment, delivery or transfer to the sheriff of such property or debts, or to secure a judgment against the garnishee. Notice of petition shall also be served upon the sheriff. A garnishee may interpose any defense or counterclaim which he might have interposed against the defendant if sued by him. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 6221.

(e) Failure to proceed. At the expiration of ninety days after a levy is made by service of the order of attachment, or of such further time as the court, upon motion of the plaintiff, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received or as to which a proceeding under subdivision (d) has been commenced.

§314. Service without the state not giving personal jurisdiction in certain actions.

Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:

1. in a matrimonial action; or

2. where a judgment is demanded that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property, including an action of interpleader or defensive interpleader; or

3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel.

R. 320. Defendant's appearance.

(a) Requirement of appearance. The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after the service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf or if it was served pursuant to section 303, paragraphs two, three or four of section 308, or sections 313, 314 or 315, the appearance shall be made within thirty days after service is complete.

(b) When appearance confers personal jurisdiction generally.

Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.

(c) When appearance confers personal jurisdiction, in certain actions.

In a case specified in section 314 where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted by motion or in the answer as provided in rule 3211, unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.

R. 3211. Motion to dismiss.

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make suc horder as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. The court may order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading. Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

APPENDIX C

Prevailing Opinion.

WILLIAM SIMPSON, *et al.*,

Plaintiffs-Respondents,

vs.

FRED LOEHMANN,

Defendant-Appellant.

FULD, Ch. J.:

On this appeal, the defendant asks us to reconsider our recent decision in *Seider* v. *Roth* (17 N. Y. 2d 111) that the contractual rights of an insured under a policy of liability insurance constitute a "debt" which is subject to attachment.

On August 13, 1964, the infant plaintiff, a resident of New York, was injured when cut by the propeller of a boat owned by the defendant, a Connecticut resident, in the waters off Madison, Connecticut. The youngster and his father brought a negligence suit against the defendant in this State. Unable to obtain personal jurisdiction over the defendant in New York, the plaintiffs had the summons and complaint delivered to the defendant at his residence in Connecticut and attached a liability policy issued to the

defendant in that State by the Insurance Company of North America, a Pennsylvania corporation doing business in New York and having an office in Manhattan.[1]

The defendant moved to vacate the attachment on jurisdictional and constitutional grounds. The court at Special Term denied the motion; the Appellate Division unanimously affirmed "on constraint of *Seider* v. *Roth*" (17 N. Y. 2d 111), and granted the defendant leave to appeal to us.

This court in 1966 held in the *Seider case* (17 N. Y. 2d 111, *supra*) that the contractual obligation of an insurance company to its insured under its liability insurance policy constitutes a "debt" under CPLR 5201 and, as such, is subject to attachment, at the suit of an injured third party, under CPLR 6202. As noted above, the defendant upon this appeal asks us to reconsider and overrule our decision in *Seider* in the light of Federal constitutional issues not raised in that case. The constitutional contentions now urged are that the attachment made pursuant to the provisions of the CPLR as construed (1) offends against due process; (2) imposes an undue burden on interstate commerce in the field of insurance; and (3) impairs the obligations of the contract of liability insurance herein.

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[1] An ex parte order of attachment was entered at Special Term directing the Sheriff of the City of New York to levy on any property of the defendant within his jurisdiction sufficient to satisfy the demands of the plaintiff, and the Sheriff thereafter attached the "rights" of the defendant under a policy of liability insurance issued by North America.

Neither of the last two constitutional arguments has, in our judgment, anything to do with the case,[2] although it does have due process overtones. No claim is advanced, and obviously none may be made, that the defendant did not have notice of the attachment. (See, e.g., *Harris* v. *Balk*, 198 U. S. 215, 227; *Holmes* v. *Camp*, 219 N. Y. 359, 369.) Our decision turns, then, on whether the obligation of the insurer doing business in New York—to defend and indemnify the insured (under its policy) enables the New York courts to exercise jurisdiction in rem over him.

In reaching its conclusion in *Seider*, the court relied on its decision in *Matter of Riggle* (11 N. Y. 2d 73), characterizing it as a "pertinent decision which cannot be distinguished away" (17 N. Y. 2d, at p. 113). The *Riggle* case involved the continuance of a negligence action in New York following the death of the defendant Riggle who was a nonresident. To obtain such a continuance, it was necessary to have an ancillary administrator appointed and served in New York, and that could only be done, pursuant

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[2] The defendant lacks standing to raise the "interstate commerce" argument but, even assuming he may, it is answered sufficiently in *Morris Plan Ind. Bank of N. Y.* v. *Gunning* (295 N. Y. 324), in which we declared (p. 332) that the inconvenience caused by the attachment of a nonresident's wages, earned out of state from a railroad doing business in New York, "does not constitute an unconstitutional burden on commerce (*Davis* v. *C. C. C. & St. L. Ry.*, 217 U. S. 157)". Nor is there any merit to the defendant's argument—which was not raised below—that the attachment impairs contract obligations by "literally inviting the insured to withhold * * * cooperation". If the insured does refuse to cooperate, the insurer's recourse is clear: he may withdraw and assert such lack of cooperation as a defense in any action brought against him under section 167 of the Insurance Law.

to the Surrogate's Court Act (§45, subd. 3), if Riggle left real or personal property in New York State. The court, after noting that the only property claimed to have been left by Riggle in New York was "the personal obligation of an indemnity insurance carrier to defend him as an additional insured under a liability policy", went on to hold that "this liability insurance policy, even though no judgment has yet been obtained against Riggle or his estate, constituted Riggle as a creditor and the insurance carrier as a debtor within the broad meaning of [section 47 of the Surrogate's Court Act] for this purpose" (11 N. Y. 2d, at p. 76).

In the course of his opinion in *Seider* (17 N. Y. 2d 111, *supra*) Chief Judge Desmond, who wrote for the court, quoted from that excerpt and then stated (p. 114): "It is interesting to note that the dissenting Judge in *Matter of Riggle* conceded that the insurance company's obligation 'to defend and contingently indemnify' was a debt, but he was of the opinion, contrary to that of the majority, that the insurer was not a resident of the State within the meaning of section 47. The reasoning of the *Riggle* case is sound and calls for an affirmance here. Decisions just like *Riggle*, some of them quite old, are found in other States [cases cited]." And Judge Desmond added (pp. 114-115): "Not only has the law question in this case been decided by *Riggle* but there is no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont injuring New York residents, any more than there was in *Oltarsh* v. *Aetna Ins. Co.* (15 N. Y. 2d 111) where for the first time we held that when New York residents were injured outside the State we would allow a direct action in New York against the in-

surer although there was nothing in previous New York law permitting it."

As demonstrated by a reading of the majority and dissenting opinions in the *Seider* case, the question whether the insurer's obligation constitutes a debt owing to the insured defendant and, as such, is subject to attachment under the CPLR was thoroughly debated and considered. It was our opinion when we decided that case, and it still is, that jurisdiction in rem was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. And we perceive no denial of due process since the presence of that debt in this State (see, e.g., *Harris* v. *Balk*, 198 U. S. 215, *supra*)—contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him. It is, of course, hardly necessary to add that neither the *Seider* decision nor the present one purports to expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached, that is, the liability insurance policy. For the purpose of pending litigation, which looks to an ultimate judgment and recovery, such value is its face amount and not some abstract or hypothetical value.

The argument that our decision sanctions a "direct action" against the insurer is sufficiently answered by what we wrote in *Seider* v. *Roth* (17 N. Y. 2d, at p. 114):

> "It is said that by affirmance here we would be setting up a 'direct action' against the insurer. That is true to the exent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant

has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured."

In concluding that we should adhere to *Seider* v. *Roth*, it may prove helpful to have in mind some of the considerations upon which that decision was predicated.

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, e.g., *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Ins. Co.*, 355 U. S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N. Y. 2d 443.) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation. (See, e.g., *Trasher* v. *United States Liab. Ins. Co.*, 19 N. Y. 2d 159, 167.) Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, it has a substantial and continuing relation with the controversy. For jurisdictional purposes in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.

The position taken by some who disagree with *Seider* would require that, as a matter of State policy, insurance be explicitly eliminated as the basis for the exercise of our in rem jurisdiction but this represents a judgment re-

quiring data and information with respect to the practical effect of the *Seider* decision not presently available to this court.

Almost half a century ago, Chief Judge Cardozo began his famous article, "A Ministry of Justice" (35 Harv. L. Rev. 113), with the statement that "The courts are not helped as they could and ought to be in the adoption of law and justice". Sometime thereafter, the New York Legislature created a law Revision Commission and, more recently, the State's Judicial Conference appointed an Advisory Commission on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the bases for in personam jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of in rem jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of in rem jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship *inter se*, of in rem jurisdiction, in personam jurisdiction and *forum non conveniens*. Absent new data suggesting the desirability of a departure from the general principles underlying in rem jurisdiction, as reflected in *Seider*, we find neither basis nor justification for departing from our holding in that case.

The order appealed from should be affirmed, with costs, and the certified question answered in the affirmative.

Keating, J. (concurring):

An automobile liability insurance company subjects itself to the laws of any jurisdiction through which the insured passes and becomes involved in an accident. Louisiana, for example, has a direct action statute. Thus, although the insurance policy was issued to the insured in Connecticut, there is little question that, if the accident had taken place in Louisiana, the insurance company could be called upon to defend the action as a party defendant in that state, provided that jurisdiction could be obtained. (*Watson* v. *Employers Liab. Assur. Corp.* 348 U. S. 66). And, if the party injured in a Louisiana accident was a New York resident and jurisdiction over the insurer could be had in this state, we would permit a direct action to be commenced here. (*Oltarsh* v. *Aetna Insurance Co.*, 15 N Y 2d 111).

The constitutional justification for subjecting the insurer to such liability arises not *per se* because the accident took place in Louisiana but because the occurrence of the accident gave rise to a legitimate governmental interest which Louisiana has in protecting the rights of those persons injured within its borders. As the Supreme Court wrote in *Watson* v. *Employers Liab. Assur. Corp.*, *supra*, p. 72:

> "Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call on friends, relatives or the public for help. Louisiana has manifested its natural interest in the injured by

providing remedies for the recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment." (See, also, *Clay* v. *Sun Ins. Office*, 377 U. S. 179; Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, The Supreme Court Review, 1964, pp. 89-103.)

Similar state interests, it seems to me, would sustain a direct action against the insurer in this jurisdiction if the Legislature had authorized such actions, even though the action could not have been brought directly in the state in which the accident took place. Although no direct action statute is presently in effect, I see no policy reason for not holding that service of process on the real party defendant—the insurer—is sufficient to compel it to defend in this state, provided it transacts business here and is thus subject to the jurisdictions of our courts.

This court has on a number of occasions given effect to the strong state interest in facilitating recovery of persons injured in automobile accidents. The fact that the injury occurs outside of this state does not, of course, lessen that interest. (*Babcock* v. *Jackson*, 12 N. Y. 2d 473; *Macey* v. *Rozbicki*, 18 N. Y. 2d 289, 292 [concurring opn.].)

Likewise, we have on a number of occasions recognized that the real party in interest is the insurer and we have given effect to the fiction sought to be perpetuated here only where the insurer would be prejudiced thereby. As we recently stated: "The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action [only] in order to protect the insurance company against overly sympathetic juries". (*Thrasher* v. *United States Liab. Ins. Co.*, 19 N. Y. 2d 159,

167). It rejects the fiction when the policy considerations are not present. (See *Oltarsh* v. *Aetna Ins. Co.*, 15 N. Y. 2d 111, *supra; Macey* v. *Rozbicki*, 18 N. Y. 2d 289, 292, *supra* [concurring opn.]; *Thrasher* v. *United States Liab. Ins. Co.*, *supra*).

The decision in *Seider* v. *Roth* (17 N. Y. 2d 111) and the cases we decide today represent a recognition of realities and not fictions. It is for this reason that I concur in the result reached.

Breitel, J. (concurring):

I concur but only on constraint of *Seider* v. *Roth* (17 N. Y. 2d 111) so recently decided by this Court. Only a major reappraisal by the Court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.

The applicable statutes are CPLR 5201 (a) and 6202. They read as follows:

> "(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within

or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201 subd. [a])

and

"Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'" (6202)

True, these contemporary statutes are designed to reach every kind of marketable and assignable property, and every kind of right that is reducible to marketable or assignable economic value. They refer to debts and property, and in the case of causes of action they must be assignable. But they are not intended or designed to reach every obligation created by contract, however inchoate, conditional, contingent, or personal. The obligation to defend and, even more, the obligation to indemnify are just such inchoate, conditional, contingent, and personal obligations. Before they come into play, there must be an external event (usually an accident) within the coverage of the policy, performance of conditions precedent by the insured, and cooperation by the insured. Even then, if the insurer's obligation to defend is fully per-

formed, there is nothing of economic value to which the insured may make claim, receive, or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.

The statutes, in making intangible assets leviable and attachable, are not intended to reach the intangible right as such but instead to reach the tangibles that eventually must result from the intangible right. Thus, at the very least, before any intangible right has practical significance as an asset to be levied upon or attached, it must give promise of being translatable into an economically valuable tangible, usually cash. The instances are easiest for for application of the statutes when, unlike here, the intangible right is marketable or assignable. Hence, the inappropriateness of precedents based upon life insurance policies (matured or unmatured), upon property or fidelity loss policies after loss, and the like. In each of such instances the insured's right to tangible funds has attained a cognizable probability of being translated into funds.

So much for the analysis of the rights involved, no merely theoretical matter, but one which goes to the usefulness of the legal concepts employed, which must have some root in reality. As for the effect of the rule, the practical consequences are highly undesirable. This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases (see, e.g., *Gilchrist* v. *Trans-Canada Air Lines,* 27 A D 2d 524). On the basis of the rule in the *Seider* case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State.

Finally, it is hardly necessary to analyze further the vulnerability of the rule, since that task was accomplished so well by the dissent of Judge Burke in the *Seider* case. But the temptation is great to repeat Judge Burke's exposure of the fallacy underlying the rule, namely, "The existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue." (17 N Y 2d at 115).

Adverse and strident criticism by disinterested commentators on the rule is not without significance (e.g., Prof. David D. Siegel, Supplementary Commentaries to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B [1967 Cum. Sup.], pp. 13-21, 23-31; Comment, "Garnishment of Intangibles," 67 Colum. L. Rev. 550 [1967]; 71 Dick. L. Rev. 653 [1967]).

I do not reach the constitutional issues raised. If the Court was right in the *Seider* case, then there is no constitutional question. If it was wrong, there still might be no constitutional question. But it could not have decided the substantive question without assuming a reality in the "obligation" being attached that would satisfy constitutional standards.

Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed.

Burke, J. (Dissenting):

In my dissent in *Seider* v. *Roth* (17 N. Y. 2d 111) I indicated why in my view there was not in that case even

an attachable debt which could serve as a basis for the exercise of jurisdiction under our practice statutes. The constitutional arguments raised in this case, as well as in *Victor* v. *Lyon Assoc.*, decided herewith (21 N Y 2d 695), were not raised in *Seider* and thus it was not necessary to reach these so difficult issues in that case. In considering now the constitutionality of our claim of jurisdiction to affect the rights and interests of parties involved in *Seider*-type controversies, I am moved to confess agreement with the comment of Professor Siegel: "Whatever problems one can conjure up in connection with [Seider] prove incomplete; more appear, and each partakes of the same theoretical and practical difficulties. These problems often prove so bizarre that they become difficult even to verbalize." (Professor D.D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B [1967 Cum. Sup.], p. 16.) *Seider* cannot be fitted into the traditional modes of analysis ordinarily useful in considering jurisdiction, except with great difficulty, and even applying the more recently devised (progressive, if you will) approach to jurisdiction wherein the distinction between in rem and in personam jurisdiction is deemphasized (see, e.g., *Atkinson* v. *Superior Ct.*, 49 Cal. 2d 338, apps. dsmd. and cert. den. *sub nom. Columbia Broadcasting System* v. *Atkinson*, 357 U. S. 569), *Seider* presents substantial problems. I am, however, constrained to conclude that under none of these approaches can *Seider* be upheld as constitutional.[1]

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[1] It ought to be noted that under *New York Life Ins. Co.* v. *Dunlevy* (241 U. S. 518), an action at least initially *in rem* in character, as it was commenced by means of a garnishment of the insurer's obligation to pay the value of the policy, *Seider* might well be held unconstitutional. (See Seigel, op. cit. pp. 19-20). I must be frank, however, to admit my uncertainty as to whether the result obtained there ought to control here. Developments in the area of jurisdiction have come a long way since 1916 when *Dunlevy* was decided.

Appendix C

Considered as but the creation of a "direct action" remedy, arrived at by way of judicial decision, rather than through the more normal fashion of legislation, and therefore based, in reality, if not in form, solely upon *in personam* jurisdiction over the insurer, rather than on the existence of "property" belonging to the ostensible defendant-insured within this state, *Seider* is of doubtful constitutionality. Granted jurisdiction over the insurer, this state's interferenee with or alteration of the rights and obligations of parties to a contract of insurance issued out of state violates due process, it seems clear under. *Watson* v. *Employer's Liab. Assur. Corp.*, (348 U. S. 66), unless we can show a sufficient State interest in the insurance relationship or in the underlying accident to justify such interference. (This point is discussed with particular acuity in an excellent student comment on *Seider*, "Garnishment of Intangibles," 67 Col. L. Rev. 550 at 558-60.) Mere presence of the insurer in this state, which is all that *Seider* appears to require, based as it is on a highly formalistic *in rem* attachment approach, would not seem sufficient to establish such an interest,[2] and even if *Seider* is to be read as requiring that the plaintiff must have been a New York resident at the time of

[2] Illustrative of the type of case *Seider* would appear to invite into our courts is the *Vaage* case (see *Nationwide Ins. Co.* v. *Vaage*, 265 F. Supp. 556 [S. D. N. Y. 1967]). Vaage, a citizen and resident of Norway, has commenced, by means of a *Seider*-type attachment, an action in New York based upon an automobile accident in which he was involved in North Carolina. Defendant is a North Carolina resident and the liability policy was issued there. What purpose allowing suit to be brought here, other than possibly increasing Vaage's hoped for damage award, is beyond me.

the accident,[3] these would not seem sufficient additional circumstances to warrant interference with the rights and obligations of the parties to the out of state contract. In *Watson* the Supreme Court was at pains to stress the significance of the occurrence of the injury in the forum state. The Court remarked:

> "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. *Persons injured or killed in Louisiana* are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. * * * Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. * * * If this motion [to dismiss] is granted, Mrs. Watson but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and *her claim is for injuries from a product bought and used there*" (*supra*, pp. 72-73; emphasis added).

Seider may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, *Seider* would seem to allow) an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent,[4] only if we may say to such persons that no mat-

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[3] This might pose a problem under the federal constitution if *Seider's* in rem basis were carried to its logical extreme. See *Harris* v. *Balk* (198 U. S. 215 at 223-24).

[4] For example, in *Victor* v. *Lyon Assoc.* (21 N. Y. 2d 695) plaintiff was injured in Danang, South Vietnam. Defendant is a Maryland corporation doing business in the Far East and the policy was issued in Okinawa. Coverage was limited to certain areas in the Far East.

ter which state or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character. I do not read *Watson* as allowing this and, in fact, *Home Ins. Co.* v. *Dick* (281 U. S. 397) may be read as barring such an extension of the regulatory power of this state beyond its territorial limits. In *Dick*, the Supreme Court, in language particularly apt for the *Seider* situation, pointed out that residence was not enough to create such jurisdiction. It there remarked: "The fact that Dick's permanent residence was in Texas is without significance. *At all times here material*, he was physically present and acting in Mexico." (*supra*, p. 408; emphasis added. *Cf. Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S. 179, at 182.) Likewise, at all times that I would consider material, to wit, when the accidents occurred, *Seider* and the plaintiffs in the cases now before this court, *Simpson* and *Victor*, were "physically present and acting" outside this state.

Watson is in many ways analogous to developments that have taken place in the extension of state court jurisdiction under the various state "long-arm" statutes. In fact, many would urge that on the facts of that case Louisiana might have constitutionally exercised *in personam* jurisdiction over the out-of-state manufacturer (compare *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432; compare, also, *Feathers* v. *McLucas*, 15 N Y 2d 443, at 458-64, with the subsequent amendment to CPLR 302 added by L. of 1966, ch. 690). Under the facts of *Seider* and the cases now before us I know of no authority that would support *in personam* jurisdiction in the courts of this state over the out-of-state defendant-insured.

The very same considerations lead me to doubt that jurisdiction *in rem* based upon the obligations of an insurer under a contract of insurance, can constitutionally be exercised by this state in the *Seider* situation. Assuming even the continued utility and constitutional viability of the rule of *Harris* v. *Balk* (198 U. S. 215) that a debt has its *situs* and may be attached in any state in which the debtor is subject to *in personam* jurisdiction, it is clear that the obligations of an insurer under a liability policy to defend and indemnify the insured are not "ordinary debts," such as the Supreme Court was considering in *Harris* v. *Balk* (see 198 U. S. at 223). They are contingent contractual obligations, requiring the commencement of suit against the insured (and the obtaining of a judgment with respect to the obligation to indemnify) before the insured has any claim against the ostensible "debtor" insurer. The defendant-insured has no property within the state, which is the necessary predicate for an exercise of *in rem* jurisdiction (*Hanson* v. *Denckla*, 357 U. S. 235, 246), unless New York may properly (*i.e.*, constitutionally) transform these contingent obligations into matured debts owing to the insured. This it cannot do absent a sufficient state interest in the insurance relationship or the accident. In my dissent in *Seider* I referred to the result obtained there as jurisdiction acquired through a "bootstrap operation" (17 N Y 2d 111, 115, quoting Professor Siegel). This sort of bootstrap operation, I respectfully submit, is constitutionally impermissible under the circumstances presented in *Seider* and the cases now before this court.

Going further, it may well be argued that even if these intangible interests could be considered fully matured and owing to the insured even before the commencement of

an action *in personam*, strong arguments exist for the proposition that due process bars assigning such intangibles a *situs*, for attachment purposes, in New York. As mentioned above, *Harris* v. *Balk* (*supra*) speaks only of "ordinary debts" and *Hanson* v. *Denckla* may fairly be read as leaving open the question of *situs* for jurisdictional purposes of less simple intangibles, if not even as seriously undercutting *Harris* v. *Balk* altogether. The Court in *Hanson* v. *Denckla* in discussing *in rem* jurisdiction pointed out that, while tangible property posed no problem for application of the rule that the property had to be within the territorial jurisdiction of the forum state for an exercise of such jurisdiction to be proper, the *situs* of intangibles posed quite a different problem. (See 357 U. S. 235, 246-47, *supra*.) The Court expressly declined to decide whether the type of jurisdiction there dealt with could be exercised by more than one state (which it was at liberty to do as the parties apparently assumed the trust assets were located exclusively in Delaware). (*Ibid.*) The Supreme Court is, it seems clear, peculiarly aware of developments in this area of the law (see *Texas* v. *New Jersey*, 379 U. S. 674, 678) and it might well be prepared to accept the view of the authors of a recently proposed revision of the Restatement of Conflicts that state courts ought not to exercise jurisdiction over an "interest in an intangible thing which is not embodied in a document unless the relationship of the state to the thing and to the parties makes the exercise of such jurisdiction reasonable." (See Proposed Official Draft, Restatement of Conflict of Laws, 2d, Pt. I, May 2, 1967, §65.) This would bring the test for *in rem* jurisdiction over intangibles having a possible *situs* in a number of states quite close to that obtaining for *in personam* jurisdiction. It might even be suggested that such property ought to be assigned a *situs* in

a particular jurisdiction for *in rem* jurisdiction purposes only where the jurisdiction has some "minimum connection" with the property and "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (*International Shoe Co.* v. *Washington*, 326 U. S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222; *cf. Atkinson* v. *Superior Ct., supra.*) The assigning of *situs* to intangibles is, as we all know, but a legal fiction (see *Hanson* v. *Denckla, supra*, p. 247; see, also, *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co.*, 255 N. Y. 120 at 123; *Bankers Trust Co.* v. *Equitable Life Assur. Soc.*, 19 N Y 2d 552, at 556) and while justice or convenience may on occasion require such an assignment of *situs* to intangibles, considerations of the purpose for which such an assignment of *situs* is necessary and fairness to those claiming an interest in the subject property ought to govern the selection process. (Compare *Bankers Trust Co.* v. *Equitable Life Assur. Soc., supra;* see, also, *Texas* v. *New Jersey, supra.*)

As the foregoing analysis makes clear, *Matter of Riggle* (11 N Y 2d 73) in no way required the result reached in *Seider*. In *Riggle* plaintiff had, in fact, secured *in personam* jurisdiction over Riggle before his death. All that was sought to be achieved there was a means of continuing the action against his estate. In terms of current jurisdictional notions this result was perfectly fair and proper. *Cf. Rosenfeld* v. *Hotel Corp. of America*, 20 N Y 2d 25.) What was done in *Riggle* should not, simply because of the form our action there took, be held to dictate the result reached in *Seider*. The circumstances of the two cases are entirely different.

I would reverse the order of the Appellate Division in this case, as well as in *Victor* v. *Lyon Assoc.*, and remand

the cases to the Supreme Court with directions that the motions to vacate these attachments be granted.

* * *

Opinion by Chief Judge FULD. All concur, Judge KEATING in an opinion and Judge BREITEL in a separate opinion in which Judge BERGAN concurs, except Judge BURKE who dissents and votes to reverse in an opinion in which Judge SCILEPPI, concurs.

Order affirmed, etc.

SUPREME COURT, U. S.

FILED

MAR 18 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY,
Appellant,

—against—

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. McCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF IN AID OF JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1967

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant,

—against—

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Appellees.

APPELLANT'S SUPPLEMENTAL BRIEF IN AID OF JURISDICTIONAL STATEMENT

Rule 16

The appellant, Nationwide Mutual Insurance Company (hereinafter "Nationwide") files the within supplemental brief, pursuant to Rule 16 of the Rules of this Court, in order to call the attention of the Court to two cases which came to the attention of counsel, or were decided, subsequent to the filing of the Jurisdictional Statement on February 29, 1968.

The question presented on this appeal concerns the constitutionality of certain statutes of the State of New York

which have been construed by the Court of Appeals of the State of New York to permit New York courts to obtain jurisdiction over non-resident defendants by attaching their automobile liability insurance policies.

As stated on page 18 of the Jurisdictional Statement, four of the seven judges of the Court of Appeals of the State of New York reasoned in *Simpson* v. *Loehmann,* N.Y.2d (decided November, 1967) that such attachments were unconstitutional, but refused to prohibit them, allegedly because that court had so recently held them to be legal and permissible in the case of *Seider* v. *Roth,* 17 N.Y.2d 111 (1966).

New Cases

On February 26, 1968, the United States District Court for the Southern District of New York held in the case of *Podolsky* v. *Devinney, et al.,* F. Supp , that such attachment procedure was in all respects unconstitutional. A copy of the opinion in the *Podolsky* case is reproduced in full in Appendix A hereto.

In addition, on March 4, 1968 the Supreme Court of the State of New York, Appellate Division, Second Department, New York State's intermediate appellate court, refused to follow the *Simpson* case, and held in *Vaage* v. *Lewis,* Misc. 2d , that such attachments were unconstitutional. A copy of the opinion of the New York court in that case is reproduced in full in Appendix B hereto.

The *Vaage* case was but one of the actions which Nationwide sought to enjoin in the instant action, and the afore-

said decision by the New York courts in that case in no way settles or disposes of the crucial questions raised here. On the contrary, the decisions in the *Podolsky* and *Vaage* cases merely serve to emphasize the need for this Court to take jurisdiction. In all probability, those cases will never be reviewed by any higher court. Counsel for *Podolsky* has advised me that plaintiff does not intend to appeal. In the *Vaage* case the plaintiff cannot appeal as of right to the New York Court of Appeals, and must obtain permission to do so from the Appellate Division, Second Department, and it would seem doubtful that that court would grant such permission, since the Judges of that court were unanimous in holding such attachments to be unconstitutional. Finally, of course, even if appeal were permitted, there is no reason to believe that the New York Court of Appeals would change its mind now that it has twice upheld the legality of such attachments in the *Seider*, and now the *Simpson* cases.

Accordingly, unless this Court takes jurisdiction over the instant appeal, the law of the State of New York with respect to the legality of the attachment of automobile liability insurance policies will continue to be confused and unsettled.

Respectfully submitted,

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APPENDIX A

Opinion of Croake, D.J.

(Podolsky v. Devinney)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67-Civ. 3150

BETTY PODOLSKY,

Plaintiff,

—v—

ETHEL M. DEVINNEY and GARRY A. DEVINNEY,

Defendants.

Appearances:

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By: Charles G. Pillon, Esq.
Of Counsel

CROAKE, D. J.

OPINION

The present motion, seeking vacation of an order of attachment, challenges the constitutionality of the recent decision by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966).[1] In that case the Court of Appeals decided that an automobile liability insurance policy held with an insurance company doing business in New York becomes an attachable debt within the meaning of §§ 5201 and 6202 N.Y.C.P.L.R.[2] upon the occurrence of an automobile accident.[3] The defendants, through attorneys secured by their insurer, General Accident Fire & Life Assurance Corporation, Ltd. (GENERAL ACCIDENT)[4]

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[1] The constitutionality of the rule laid down in *Seider* v. *Roth* has been upheld by the New York Court of Appeals in a sharply divided opinion. *Simpson* v. *Loehman*, N. Y. 2d (December 29, 1967), 36 U.S.L. Week 2443 (January 30, 1968), discussed at pp. 6-8, *infra*.

[2] Section 5201 in pertinent part provides:

"(a) *Debt against which a money judgment may be enforced.*

A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

"(b) *Property against which a money judgment may be enforced.*

A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. . . ." See also § 6202 N.Y.C.P.L.R. providing that debts described in § 5201 are subject to attachment.

[3] See *Seider* v. *Roth*, 17 N.Y. 2d 111, 113, 269 N.Y.S. 2d 99, 101 (1966).

[4] GENERAL ACCIDENT is a corporation organized and existing under the laws of Great Britain and is authorized to do business in New York, New Jersey, and several of the other states in the United States. (See Pillon Affidavit in support of the present motion.)

charge that New York lacks the requisite minimum contacts necessary to subject the insurance policy to levy and therefore assertion of jurisdiction by New York State violates the due process clause of the 14th amendment of the United States Constitution. The motion papers on behalf of the insurer as garnishee also contend that because a limited appearance is not permitted under the New York law the named defendants, by failing to authorize an appearance of the insurance company on their behalf, may subject the insurer to a default judgment up to the policy limits without ever allowing the company to defend the action on its merits.[5] GENERAL ACCIDENT argues that such a result would deprive it of its property without due process of law. Implicit in both of these objections to jurisdiction is the contention that New York in effect has established a direct action without sufficient minimum contacts or without adequate procedural safeguards.

The present controversy is a product of an accident occurring on or about May 8, 1966. The plaintiff, a New York resident, alleges in her complaint that while crossing Saddle River Road at the intersection with Rys Place in Fairlawn, New Jersey, she was struck by an automobile owned by Ethel M. Devinney and being operated at the time by her son, Garry A. Devinney. The Devinneys are residents of New Jersey. As a result of the accident plaintiff Podolsky suffered serious injuries requiring hospitalization in Fairlawn Memorial Hospital in Fairlawn, New Jersey, from the date of the accident through June 10th of that year. Damages sought in the complaint total $75,000.

On July 21, 1967, the present action was commenced against the petitioners in the Supreme Court of the State of New York in Bronx County by service of a summons and complaint. Theretofore, on July 14, 1967, an order of

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[5] See § 320 N.Y.C.P.L.R. and § 167 N.Y. Insurance Law discussed at pp. 11-12, 17-18, 20, *infra*.

attachment had issued from the above court directing the Sheriff to levy on the property of the defendants. Pursuant to this order the Sheriff attached Ethel M. Devinney's interest in automobile liability policy No. ACF 97-813-32 by delivering a copy of the order to GENERAL ACCIDENT at its offices at 110 William Street in New York City. As this action could have been brought here in the first instance under 28 U.S.C. § 1332 (1964), the defendants chose to remove to this court under 28 U.S.C. § 1441 (1964).[6] The removal was accomplished on August 17 and papers noticing this motion were promptly filed with the clerk of the court on September 12, 1967.

At the outset it should be noted that in a case where jurisdiction is based on diversity of citizenship this court normally is bound to follow the decisions of the court of

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[6] Rule 4(e), Fed. R. Civ. P., provides in pertinent part:

"*Same; Service Upon Party Not Inhabitant Of Or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of an notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides . . . . (2) for service upon or notice to him to appear and respond or defend in an action by reason of an attachment or garnishment or similar seizure of his property located within the state, service may be made under the circumstances and in the manner prescribed in the statute or rule."

Prior to the adoption in 1963 of Rule 4(e)(2) it was questionable whether this action could have been initiated in this court. Some federal courts had held that attachment and garnishment were not available until jurisdiction over the person of the defendant had been obtained by service of process. See, e.g., *Davis* v. *Ensign-Bickford Co.*, 139 F. 2d 624 (8th Cir. 1944). See generally *Carrington, The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303, 305 (1962). However, it was always clear that the present action could be removed to this court. See *Davis* v. *Ensign-Bickford Co., supra; Hotcher* v. *Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267 (8th Cir. 1904).

last resort in New York. *Guaranty Trust Co.* v. *York*, 325 U.S. 99 (1945); *Erie* v. *Tompkins*, 304 U.S. 64 (1938). The District Court must apply the law enunciated by the highest state court even if it believes a given case was wrongly decided. *Universal Underwriters Ins. Co.* v. *Wagner*, 367 F. 2d 866 (8th Cir. 1966); *Klages* v. *Cohen*, 146 F. 2d 641 (2d Cir. 1945); *Paschall* v. *Mooney*, 110 F. Supp. 749 (S.D. N.Y. 1953). However, even in diversity cases, when the decision of the state court is challenged on constitutional grounds, this court must be guided by the decisions of the Supreme Court and appellate courts of the United States rather than the state courts. See *Gilmore* v. *Greene County Democratic Party Exec. Comm.*, 370 F. 2d 919, 920 (5th Cir. 1966); *Aftenase* v. *Economy Baler Co.*, 343 F. 2d 187 (8th Cir. 1965); *Ark-La Feed & Fertilizer Co.* v. *Marco Chemical Co.*, 292 F. 2d 197 (8th Cir. 1961); *Belanger* v. *Great American Indemnity Co. of N.Y.*, 89 F. Supp. 736, 738 (D.C.La. 1950). Therefore, while the rationale of the New York Court of Appeals in *Seider* v. *Roth, supra*, deserves our careful consideration, this court is not necessarily bound by that determination. See, e.g., *Smayda* v. *United States*, 352 F. 2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

The serious constitutional questions presented in this case have been the subject of several prior determinations in both federal and state courts in New York. In *Nationwide Mutual Ins. Co.* v. *Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967), a three judge court was convened to consider the constitutionality of the attachment procedure approved in *Seider* v. *Roth*. While the three judge court dissolved itself on the ground that under 28 U.S.C. § 2283 (1964), it lacked the power to enjoin the pending state court actions, Judge Tyler writing for the panel also observed that the insurance companies had ". . . yet to fully and fairly present their constitutional arguments to the New York courts at

any level." *Id.* at 562. Under these circumstances the court believed that the companies had not shown the existing state actions could not be prosecuted with full protection of the petitioners' constitutional contentions. See *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 420 (1964); *Government & Civil Employees Organizing Comm., CIO* v. *Windsor,* 353 U.S. 364 (1957); *Railroad Comm. of Texas* v. *Pullman Co.,* 312 U.S. 496, 501 (1941).

Any reasons for abstention by the federal courts, however, have now been removed, for the New York Court of Appeals has upheld the constitutionality of *Seider* in *Simpson* v. *Loehmann,* N.Y. 2d (December 29, 1967); 36 USL Week 2443 (January 30, 1968). In *Simpson* an infant plaintiff was injured when cut by the propeller of a boat owned by a Connecticut resident in the waters off Madison, Connecticut. Being unable to obtain in personam jurisdiction over the defendant in New York (see § 302 N.Y.C.P.L.R.), an action was commenced by personal service on the defendant in Connecticut and attachment of an insurance policy issued to the defendant by an insurance company doing business in New York. The defendant moved to vacate the attachment on jurisdictional and constitutional grounds. The Court of Appeals upheld the attachment procedure in a sharply divided opinion.[7] The opinion of the

[7] The Court of Appeals split on several issues present in *Simpson* v. *Loehmann,* N.Y. 2d (December 29, 1967), 36 U.S.L. Week 2443 (January 30, 1968). Chief Judge Fuld (with whom Judge Van Voorhis concurred) and Judge Keating upheld the constitutionality of the rule in *Seider* on different theories and in separate opinions which are discussed in the text at pp. 7-8, *infra.* Judge Burke wrote a dissenting opinion in which Judge Scileppi concurred.

Judges Breitel and Bergan avowedly did not reach the question of *Seider's* constitutionality. They voted to affirm the rule on institutional considerations, feeling that judicial consistence on these attachments was more important that the correctness of the attachment procedure itself. In the main, however, their opinion was a

court was written by Chief Judge Fuld and followed what may be characterized as the traditional approach to the question of jurisdiction. The opinion in simplest terms stated that the insurance policy could fairly be characterized as a debt. The requisites necessary for *in rem* or *quasi in rem* jurisdiction are the presence of the *res* within the state, effective seizure, and adequate notice to its owner.[8] Judge Fuld found these requisites present in *Simpson* for there was personal service upon the owner of the debt and under the rule in *Harris* v. *Balk*, 198 U.S. 215, 227 (1905), the situs of a debt follows the debtor and is subject to garnishment wherever the debtor may be found. As the insurance company was doing business in New York the situs of the debt was New York.[9]

Judge Keating concurring in the opinion of the court expanded upon the theme, also expressed by Judge Fuld, that the procedure sanctioned in *Seider* v. *Roth* can be sustained on the ground that the State of New York has a sufficient

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strong dissent against the denomination of an insurance policy as a debt. Indeed, at one point Judge Breitel observed that "the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation." *Id.* at , 36 U. S. L. Week at 2444.

[8] *Harris* v. *Balk*, 198 U.S. 215, 227 (1905); *Pennoyer* v. *Neff*, 95 U.S. 714, 722-23 (1878).

[9] Chief Judge Fuld did not wrestle with the problem that under his analysis the situs of this *res* is not only New York but every state where the particular insurance company involved is doing business. While in this case no problem of conflicting jurisdiction is presented, it is not difficult to develop a fact situation where a serious problem could arise. Such would be the case were other states to engraft a *Seider* type procedure onto their attachment statutes and were an accident to occur involving plaintiffs who were citizens of New York and one of these jurisdictions. Would not then the debt be situated in both states at the same time? This is one of the things that distinguishes the present procedure from that sanctioned by *Harris* v. *Balk* where, although the situs of the debt is changeable, there can never exist more than one situs at any given point in time.

governmental interest in accidents involving New York plaintiffs to legislate a direct action statute. In Judge Keating's view the procedure in *Seider* v. *Roth* accomplishes this result by compelling the insurer, the real party defendant, to defend in this state provided it transacts business here and is thus subject to the jurisdiction of the New York courts. See *Simpson* v. *Loehmann,* N. Y. 2d at (December 29, 1967); 36 U.S.L. Week 2444 (January 30, 1968).

Both of these views must be carefully considered with the caveat that this court should not decide that the New York attachment procedure used in the present case is unconstitutional unless such an adjudication is unavoidable. See *United States* v. *Chibbaro,* 361 F.2d 365 (3rd Cir. 1966); *Kelly* v. *Illinois Bell Tel. Co.,* 325 F. 2d 148 (7th Cir. 1963).[10]

The concept of *quasi in rem* jurisdiction is based on the physical power of the state with regard to the *res* or thing attached. See *McDonald* v. *Mabee,* 243 U. S. 90, 91 (1917); *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). As such it must be

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[10] It might be noted parenthetically that the lower federal courts have more than a passing interest in the attachment procedure sanctioned in *Seider* v. *Roth.* The state courts are admittedly unable to obtain in personam jurisdiction over the defendants now brought before them under the *Seider* procedure. As undoubtedly there exists diversity of citizenship in all cases pursued under the *Seider* procedure, removal will be sought in many of the cases where the jurisdictional amount necessary for federal adjudication is present. This opens up a whole new area of diversity jurisdiction under Rule 4(e) and the federal courts will be administering a state rule of questionable constitutionality. The present question then is of importance to the entire federal court system whose diversity jurisdiction Congress has consistently sought to limit. See, e.g., 28 U.S.C. § 1332(a) (1964), (amended in 1958 substituting $10,000 for $3,000); 28 U.S.C. § 1332(c) (1964) (adding in 1964 a proviso deeming an insurer of liability insurance, in an action in which the insurer is not joined as a party-defendant, a citizen of the state of which the insured is a citizen, as well as the states where the insurer has been incorporated and has its principal place of business).

recognized that the authority of any tribunal is necessarily restricted by the territorial limits of the State in which it is functioning. See, e.g., *Hanson* v. *Denckla*, 357 U. S. 235, 246 (1958). While tangible property rarely poses any difficulty in determining the situs of the *res*, the location and character of intangible assets is often a troublesome problem.[11] In *Harris* v. *Balk*, *supra*, the United States Supreme Court held that a simple debt "... clings to and accompanies ... [the debtor] ... wherever he goes. ... It is not a question of possession in the foreign state for possession cannot be taken of a debt ... as tangible property might be taken possession of." *Id.* at 222-23. In the decision of that case emphasis was placed on the fact that because a *simple* debt was involved, "... Balk could have sued Harris in Maryland to recover his debt notwithstanding the temporary character of Harris' stay there." *Id.* at 224.

More than sixty years have passed since the decision in *Harris* v. *Balk* and the question before this court is whether within the confines of due process an insurance policy may be viewed as a simple debt subject to attachment wherever the debtor (the insurance company) may be found. As the New York Court of Appeals saw the problem in *Seider*:

> "The whole question, therefore, is whether [the insurer's] contractual obligation to defendant is a debt or cause of action such as may be attached. The ... policy is in customary form. It requires [the insurer] among other things, to defend [the insured] in any automobile negligence action and, if judgment be rendered against [the insured], to indemnify him there-

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[11] See *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1156-59 (1966) (hereafter Jurisdiction to Adjudicate); *Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 Colum. L. Rev. 550, 551 (1967). See also *Comment*, 16 Buffalo L. Rev. 769 (1967; *Case Note, 8 B.C. Ind. & Com. L. Rev.* 147 (1966).

> for. Thus as soon as the accident occurred there was imposed on [the insurer] a contractual obligation which should be considered a 'debt' within the meaning of CPLR 5201 and 6202." *Seider* v. *Roth, supra,* at 113, 269 N.Y.S.2d at 101.

Automobile liability insurance policies have evolved through the years into documents representing relatively complex collections of rights and obligations involving the liability carriers, their insureds, claimants, the general public, and the state in which the policy was issued. Although the duty to defend is unquestionably a benefit accruing to an insured by reason of a liability insurance contract, this duty cannot arise until jurisdiction is obtained over the insured.[12] Nor can obligation to indemnify arise until a judgment has been entered against the insured. Further, when viewed in context, the obligation to defend is an important right of the insurer, essential in protecting its financial interest in the outcome of the litigation.

In addition to the complexity of the obligation to defend, numerous other factors in an insurance contract, such as continuing duties of the insured to his insurance company and the enumerated exclusions present in the policy, militate against characterization as a simple debt.[13] But the fact that there are problems in characterizing an insurance policy as a simple debt does not necessarily import a denial of due process. In the absence of harm to the defendants,

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[12] *Seider* v. *Roth,* 17 N.Y. 2d 111, 115, 269 N.Y.S. 2d 99, 103 (1966) (Burke dissenting). See *Siegel,* CIVIL PRACTICE COMMENTARY, *McKinney's Consolidated Laws,* 7B, at 27-30 (1967 Supp.); *Comment, 67 Colum. L. Rev.* 550, 555 (1967).

[13] An example of one such obligation is the notice provision (Condition 3, Specimen Insurance Policy of General Accident) requiring the assured to forward every demand, summons, etc., received by him in connection with an accident.

they would have no standing to complain. In addition, because the litigation is at an early stage there may be some question as to whether a potential harm is sufficiently imminent to sustain objection on due process grounds.

In this court's view, Mrs. Devinney has standing to make the present challenge. *Ex hypothesi* the policy is property or it cannot be attached. Also *ex hypothesi* the present attachment is the first step in an attempted divestiture of the property. Neither is there any question as to the time of Mrs. Devinney's challenge. If the attachment is upheld and the litigation allowed to proceed, she will necessarily lose some portion of her property no matter what course the lawsuit ultimately takes. If the case is defended, under the New York court's own characterization of the property in *Seider,* a part of it must necessarily be consumed in defense of the action.[14] More importantly by virtue of § 320 N.Y.C.P.L.R., appearing in defense of the action submits a defendant to personal jurisdiction in

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[14] At the time of attachment the obligation to defend appears the only conceivable *res*. Certainly under the wording of §5201 N.Y. C.P.L.R. the Court of Appeals does not consider the obligation to indemnify as matured. Thus, no matter what the outcome, any defense of the action necessarily consumes some of the *res* represented by the obligation to defend. The fact that Mrs. Devinney may prevail on the merits has no bearing because even in so prevailing, the value of the initially attached *res* will be totally consumed. Nor is the fact that counsel fees vis-a-vis the potential liability are a relatively small amount of constitutional moment since counsel fees certainly exceed *de minimus* proportions.

The argument that the property rights of Mrs. Devinney in this *res* are not of the usual sort does not affect her standing to challenge the constitutionality of the present procedure, for the basis of jurisdiction is clearly by way of attachment rather than by direct action against the insurance company. The question of whether Mrs. Devinney or the insurance company is the real party in interest is considered at pp. 15-18, *infra*.

New York.[15] The end result of such submission might be a valid judgment exceeding the policy limits. If, on the other hand, the defendants choose to default, the garnishee loses its ability to control the defense which is an important guarantee under its contract with the assured.[16] Moreover by refusing to appear, defendants may place their rights to a later defense and indemnity in jeopardy.[17] Thus,

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[15] Section 320 N.Y.C.P.L.R. in relevant part provides:

"*Defendant's appearance.*

* * *

(c) *When appearance confers personal jurisdiction, in certain actions.*

In a case [such as the present one] where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not the equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted at the time of appearance by motion or in the answer, unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." *See generally, Note, Jurisdiction Service and Appearance Under the CPLR, 37 St. John's L. Rev.* 285 (1963).

[16] See Specimen Insurance Policy of GENERAL ACCIDENT, Coverage A & B. By virtue of § 167 N.Y. Insurance Law, the insurer may not relitigate the merits of the defaulted case, that being foreclosed by the default. See pp. 17-20, *infra*, where the operation of §167 N.Y. Insurance Law is discussed in detail.

[17] The present observation is prompted by a dictum in Chief Judge Fuld's opinion in *Simpson* v. *Loehmann*, __ N. Y. 2d __, n. 2, summarized in N.Y.L.J., p. 1, col. 4 (January 24, 1968). In discussing the objection that the *Seider* procedure invites the insured to withhold cooperation, the Chief Judge commented:

". . . Nor is there any merit to the defendant's argument—which was not raised below—that the attachment impairs contract obligations by 'literally inviting the insured to withhold cooperation.' If the insured does refuse to cooperate, the insurer's recourse is clear; he may withdraw and assert such lack of cooperation as a defense in any action brought against him under section 167 of the Insurance Law."

a serious question arises whether this attachment, which involves a taking of what is *ex hypothesi* property, meets the standards of due process of law.

The landmark case of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) reflected a rethinking on the part of the Supreme Court of traditional notions of due process as it related to jurisdiction.[18] The court there held that "due process requires only that . . . [there be] . . . certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316. See also *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

It is settled that at the present state of development in American law[19] an attempt to obtain in personam jurisdic-

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If such a procedure is allowed and if the insured chooses to default, the insurance company will not be liable for the amount of the default up to policy limits. However, a finding by a New York court that the insured failed to cooperate would presumably strip the insured of his coverage in the event he was sued in another state and that state gave the New York court's judgment "full faith and credit." Whether a sister state would be required to give full faith and credit to such a New York judgment on the grounds that the insurance company and its assured are in privity is a complex question which this court is not in a position to resolve. (Professor Seigel has expressed the view that a sister state would not be so bound. See *Seigel, Simpson Upholds Seider—Problems for Both Sides, Notes and Views,* N.Y.L.J. (January 24, 1968), Part II in a III Part Series). Suffice it to say that if no full faith and credit is required then the *Seider* procedure is a complete waste of time and money for both parties to the litigation. If full faith and credit is required the entire procedure acts as a "velvet covered hammer" coercing the insured to submit to in personam jurisdiction when no basis for the assertion of it is present.

[18] See generally, Kurland, *The Supreme Court, The Due Process Clause And The In Personam Jursdiction of State Courts,* 25 U. Chi. L. Rev. 569, 577-86 (1958).

[19] The German approach to this problem has been more expansive. Although the Federal Republic of Germany is operated under a federal system, section 23 of the German Code of Civil Procedure allows

tion over the present defendants would not comport with due process, even if the New York statutes purported to allow it.[20] That conclusion follows from the fact that the only nexus this litigation has with New York is the plaintiff's residence. The accident occurred in New Jersey; the defendants are residents of New Jersey; the witnesses are more readily available in New Jersey than in New York.[21] Further, the plaintiff was treated in a New Jersey hospital, presumably by New Jersey physicians, obviating New York's interest, at least in the short run, in the medical care given its citizen.[22] Thus, in this court's view, even under the broadest, functionally-oriented analysis, any attempt to assert personal jurisdiction over these defendants would violate due process.

It is this inability to obtain in personam jurisdiction over the named defendants, coupled with the fact that an insurance policy is not a simple debt, that makes the attachment particularly suspect. As noted previously, Mrs. Devinney cannot defend her property without personally appearing in the action, thereby exposing herself to a possible judgment in excess of her policy limits. It is here that the fundamental difference between a simple debt, anchoring the

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full rather than limited jurisdiction to adjudicate within a district where the debtor's property is located provided the debtor has no domicile within the country. See von Mehren & Trautman, *The Law of Multistate Problems: Cases and Materials on Conflict of Laws*, p. 673 (1965).

[20] See, e.g., the discussion in *Hanson* v. *Denckla*, 357 U.S. 235 (1958) at 250-55.

[21] While of minimum significance in this case, the accident having occurred in an adjacent state, this is of increasing importance where the accident occurs in a jurisdiction far removed from the New York forum. One such example is *American Int'l Underwriters Corp.* v. *Victor*, 265 F. Supp. 556 (S.D.N.Y. 1967), where the accident occurred in Da Nang, Republic of Viet Nam.

[22] See *Watson* v. *Employers Liability Ins. Co.*, 348 U.S. 66, 72 (1954) (dictum).

rationale in *Harris* v. *Balk*, 198 U.S. 215 (1905), and the complicated composite of rights and obligations represented by an insurance contract is of crucial importance. The simple debt contemplated by *Harris* v. *Balk* is fixed in amount. Because the defendant can have no influence on its size, he faces the simple choice of whether to forfeit this fixed amount and avoid in personam jurisdiction or defend the action and risk a judgment in excess of the value of the *res*. Here, the amount of the debt is not fixed and may be greatly influenced by the defendants' choice of appearance or nonappearance. It is this dilemma, operating to coerce the defendant into an otherwise unattainable submission to personal jurisdiction, which amounts to a denial of fair play and substantial justice vis-a-vis Mrs. Devinney. On balance, then, the mere characterization of an automobile liability insurance policy as a debt without more is not sufficient to satisfy due process. *Cf. Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930); *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916).[23]

It is at this point that Judge Keating's analysis, which in his words "is a recognition of realities and not fiction," becomes relevant. In Judge Keating's view, the insurance company is the real party in interest, and Mrs. Devinney is merely a fictional representative.[24] Implicit in this view is

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[23] "In the light of the emerging concept of personal jurisdiction, the *quasi in rem* procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff. . . ." *Carrington, supra,* note 6 at 306. See *Jurisdiction to Adjudicate, supra,* note 11 at 1132, suggesting that Home Insurance stands for the proposition that exercises of jurisdiction that are not clearly justified by the relation of the parties litigant to the forum or by other litigational and enforcement considerations may be declared unconstitutional.

[24] Judge Keating's approach in treating Mrs. Devinney as a mere fictional defendant presents difficulties. See pp. 17-20, *infra*. However, dealing only with his contention that the present contacts with New York would be sufficient to support a direct action against the insurer were the legislature to enact one, such an assertion seems unwarranted.

the feeling that due process vis-a-vis Mrs. Devinney is not the relevant concern, for if there is a serious threat of a judgment in excess of policy limits, she can always protect herself by refusing to authorize an appearance on her behalf. Judge Keating's analysis goes on to suggest that by virtue of its doing business in New York, and the minimal inconvenience of its defending the action here as opposed to New Jersey, that "service of process on the real party defendant—the insurer—is sufficient to compel it to

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Judge Keating relies heavily on the dictum in *Watson* v. *Employers Liability Ins. Co.*, 348 U. S. 66, 72 (1954), supporting Louisiana's direct action statute:

> ". . . Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call on friends, relatives or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for the recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment."

However, in the same opinion it was stated:

> "If [the motion to dismiss] . . . is granted, Mrs. Watson but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and *her claim is for injuries from a product bought and used there.*" (*Id.* at 72.) (Emphasis added.)

The above-emphasized contacts now form the basis for in personam jurisdiction in New York and other states. See, e.g., § 302, N.Y.C. P.L.R. However, no direct action statute presently in existence permits a direct action against the insurer based on the minimum contacts suggested by Judge Keating. See *La. Stat. Ann.* 22:655 (1959) (accident occurring in the state); *Wis. Stat.*, 204.30(4), 260.11(1) (1959) (accident occurring in the state and confined to automobile torts); *R.I. Gen. Laws Ann.*, 27-7-2 (1956) (action on locally issued policy if the assured cannot be served within the state). See also *P.R. Laws Ann.*, Tit. 26 §§ 2001, 2003(1) (1964) (accident occurring in the jurisdiction). See generally Note, *Direct Action Statutes: Their Operational and Conflict-Of-Laws Problems*, 74 Harv. L. Rev. 357 (1960); *Developments In The Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

defend in this state, provided it transacts business here and is subject to the jurisdiction of our courts.[25]

Normally, there would be some question in this court's mind as to the standing of the insurance company, which is not a party to the present proceeding, to assert that its property is being taken without due process. However, here there is no question that Judge Keating's analysis, by treating the insurer as the real party in interest under what is, in effect, a judicially created direct action, confers such standing at least for the purposes of examining the constitutionality of the *Seider* attachment procedure. That is, we must either discount Judge Keating's analysis or examine the real harm to the insurer which might occur as a direct result of the procedure sanctioned under *Seider* v. *Roth.*

In any defense made here, other than an attack on jurisdiction, the policyholder will be subject to in personam jurisdiction with resultant liability for any judgment rendered in excess of policy limits (the *res* in the present case). (See § 320 N.Y.C.P.L.R. which specifically abolishes the

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[25] *Simpson* v. *Loehmann, supra,* at , 36 U.S.L. Week 2444. In the present state of development of the attachment procedure sanctioned in *Seider* v. *Roth,* there appear to be few if any limiting conditions on the bringing of an action in New York. It appears that the plaintiff need not even be a resident of New York. See *Nationwide Ins. Co.* v. *Vaage,* 265 F. Supp. 556 (S.D.N.Y. 1967) (plaintiff a Norwegian citizen). Of course, if the plaintiff is not a New York resident he may run the risk of having his action dismissed on the basis of forum non conveniens. See *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). However, if the plaintiff is a resident of New York, the New York courts could not dismiss on this basis even if on the facts of the case New York would have little or no interest in the outcome of the litigation. See, e.g., *Collard* v. *Beach,* 81 App. Div. 582, 81 N.Y.S. 619 (1st Dept. 1903). Federal district courts on the other hand have wide discretion to transfer such cases to other districts in the interests of convenience and justice. 28 U.S.C. § 1404 (1964). The only limitation is that the case be transferred to a district where the plaintiff could have originally brought the action. *Hoffman* v. *Blaski,* 363 U.S. 335 (1960).

special appearance in New York.)[26] This places GENERAL ACCIDENT, a fiduciary with regard to its assured, in an unenviable position. In any action where potential liability exceeds the actual insurance coverage, no knowledgeable insured would knowingly subject himself to the personal jurisdiction of a court where the amount which might be recovered could exceed the limits of his insurance coverage. Even if an insured, unversed in the complexities of New York's procedural statutes, should give the insurer no specific instructions with respect to the defense of the negligence action brought against him, the insurer could not, consistent with the best interests of its assured, haphazardly expose him to personal liability in excess of policy limits.[27] If the situation is adequately explained to the insured, he will most likely refuse to allow the company to enter an appearance on his behalf. This is his right under § 320 N.Y.C.P.L.R. If he chooses not to appear, any unauthorized appearance on his behalf by attorneys retained by the insurance company would be a nullity as against him. See *Amusement Securities Corp.* v. *Academy Pict. Dist. Corp.*, 251 App. Div. 227, 295 N.Y.S. 436 (1st Dept. 1937); *Earl S. Peed Organization, Inc.* v. *Gray*, 40 Misc. 2d 471, 243 N.Y.S. 2d 111 (Sup. Ct. N.Y. 1963).

If the insured chooses not to appear, there is no way that the insurance company can appear to litigate its in-

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[26] See notes 13-17 *supra* and accompanying text. We do not here decide whether the present procedure would be constitutional if a limited appearance were allowed.

[27] *Cf. Brown* v. *United Fidelity and Guarantee Co.*, 314 F. 2d 675 (2d Cir. 1963); *Harris* v. *Standard Accident & Ins. Co.*, 297 F. 2d 627 (2d Cir. 1961). While the above cases deal with an insurer's duty to its assured with regard to settlement of claims which may exceed insurance coverage, we believe the principle that an insurance company must carefully consider the position of its assured is applicable in the present case. For a thorough review of the insurer's obligations vis-a-vis its assured, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1144-45 (1954).

terests. Again, the fundamental differences between a simple debt and a highly sophisticated liability insurance policy become apparent. The obligation to defend the insured is not to be regarded simply as a duty owed to the holder of the policy but also as an essential right which the insurance company reserves to itself in order to protect itself against unwarranted liability claims. In normal circumstances the insurance company maintains this right, the only reason recognized for defeasance being an irreconcilable difference of opinion between the insurer and its assured. See *Prashker* v. *United States Guar. Co.*, 1 N.Y. 2d 584, 593, 154 N.Y.S. 2d 910, 917 (1956); *Reynolds* v. *Maramorosch*, 208 Misc. 626, 144 N.Y.S. 2d 900 (Sup. Ct. N.Y. 1955). In that event the insured may conduct the defense but if he acts unreasonably he will forfeit the insurance coverage. In the presently hypothesized situation the insurance company is faced with the prospect of a default judgment. If this default occurs, and if, after damages are fixed and entered at an inquest, the judgment remains unsatisfied for 30 days, the plaintiff may sue GENERAL ACCIDENT directly for the assessed damages up to policy limits. (See § 167(1)(b) N.Y. Insurance Law.) In that eventuality, GENERAL ACCIDENT could not relitigate the question of liability, that question having been determined by the default. *Manard* v. *Hardware Mutual Cas. Co.*, 12 App. Div. 2d 29, 207 N.Y.S. 2d 807 (4th Dept. 1960), *leave to appeal denied*, 12 App. Div. 2d 891, 212 N.Y.S. 2d 1020; *Lauritano* v. *American Fire Ins. Co.*, 3 App. Div. 2d 564, 162 N.Y.S. 2d 553 (1st Dept. 1957), *aff'd without opinion*, 4 N.Y. 2d 1028, 177 N.Y.S. 2d 530 (1958); *Abrams* v. *Maryland Casualty Co.*, 98 N.Y.S. 2d 520 (Sup. Ct. Kings, May 12, 1950), *aff'd without opinion*, 278 App. Div. 951, 105 N.Y.S. 2d 991 (2d Dept.), *aff'd without opinion*, 303 N.Y. 698, 103 N.E. 2d 58 (1951).

In a direct action against the insurer, although several defenses by the insurer are permitted,[28] the only one which appears to be useful under the present circumstances is a defense based on the insured's failure to cooperate in defending the action. However, it seems highly improbable that the New York courts would permit an insurer to raise such a defense when the company itself had advised the insured that it was not in his best interests to appear.[29]

The dilemma facing GENERAL ACCIDENT in the present case and all insurance companies who are forced to defend actions in New York under the rule of *Seider* v. *Roth* is an inextricable one. The basic problem is that GENERAL ACCIDENT is not a simple garnishee, unaffected except in a collateral way by a finding of liability. It is concerned with the defense of its property which as noted above may be taken without the company ever having an opportunity to be heard.[30]

The plaintiff, recognizing the conflicting interests between the insurer and its assured which might lead to a refusal of an authorization to appear, seeks to obviate these difficulties by an offer to stipulate that in no event will damages be permitted to exceed the limits of liability coverage. We do not believe that the constitutionality of a particular rule of law turns on the existence or non-existence of an offer to stipu-

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[28] Such defenses as nonexistence of a valid policy, fraud, lack of notice, and failure of cooperation by the insured are available to the insurer.

[29] But see note 17 *supra*. See also *Seigel*, note 17, *supra*, suggesting that Chief Judge Fuld's dictum is not likely to be followed.

[30] "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1913). It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

late.[31] The fact that a particular stipulation may make it more attractive for the defendants to appear in this action is no guarantee that they will do so. Besides the potential liability, the defendants might prefer not to appear for any number of reasons, e.g., belief that their interests will better be protected in the New Jersey courts. In any event, a proffered stipulation, because it depends on the decision of the individual litigant in each case, is not sufficient to distinguish this case from others in the same category.

We do not lightly determine to put aside a procedure passed on and approved by the New York Court of Appeals on two occasions. However, although the Court of Appeals sought only to protect its citizens, in our view it cannot do so at the expense of residents of a foreign forum whose only connection with this forum is the happenstance of their injuring a New York resident. More importantly, as it may well be in the interest of the insured defendants to refuse to authorize an appearance, the present attachment procedure can operate to deprive the defendants' insurance company of its property without the plaintiff ever having demonstrated liability.

The Court of Appeals in *Simpson* sustained the constitutionality of the *Seider* procedure under two basic theoretical approaches. The first treated the problem in traditional terms, maintaining the "fiction" that the insurance policy is attachable property belonging to the named defendant. The second employed a functional analysis that put the

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[31] A stipulation requires the consent of both parties. *Winchester Drive-in-Theater* v. *Twentieh Century Fox Film Corp.*, 232 F. Supp. 556 (N.D. Cal. 1964); *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 183 F. Supp. 394 (S.D.N.Y. 1953). The affidavit of Pillon, Attorney for the petitioners in this case, frankly advises this court that Mrs. Devinney will not at this time oppose a personal appearance. However, this does not bind her and she can withdraw the consent before such an appearance is entered on her behalf.

property in the hands of the insurance company as the real party in interest. After long and painstaking deliberation this court believes that under either approach there remains a taking which does not comport with "traditional notions of fair play and substantial justice."

In accordance with the foregoing the writs of attachment are ordered vacated and this action is dismissed for want of jurisdiction.

So Ordered.

Dated: New York, N. Y.
February 26, 1968

Thomas F. Croake
U. S. D. J.

APPENDIX B

Opinion of Christ, Acting P.J.
(Vaage v. Lewis et al.)

March 4, 1968.

SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

Christ, Acting P.J., Brennan, Rabin, Benjamin and Martuscello, JJ.

LARS VAAGE,

Respondent,

v.

CLINTON JAMES LEWIS et al.,

Appellants,

NATIONWIDE MUTUAL INSURANCE COMPANY,

Intervenor.

APPEAL from an order of the Supreme Court (Harold Tessler, J.), dated November 18, 1965 and entered in Queens County, which denied defendants' motion to vacate an order of attachment and a levy thereunder and to set aside a service of the summons under the levy. The intervenor appears on the appeal by permission of the Appellate Division.

James T. Whalen (Charles G. Pillon of counsel), for appellants. 420 Irvington Avenue, N.Y.

Charles G. Pillon, for intervenor.

Schwartz, Levitt & Sommer (Arthur Blitz of counsel), for respondent.

CHRIST, Acting P. J. This appeal brings to the surface another of the difficult ramifications of *Seider* v. *Roth* (17 N Y 2d 111), recently adhered to in *Simpson* v. *Loehmann* (21 N Y 2 , dec. Dec. 29, 1967). The four opinions in *Simpson* demonstrate the complexity and dissatisfaction with the *Seider* v. *Roth* principle that a plaintiff may obtain in rem jurisdiction over a defendant by attaching the latter's insurance company's obligation to defend and indemnify. The order under review denied the defendants' motion *inter alia* to vacate the attachment.

The facts are undisputed. Unlike *Seider* and *Simpson*, the plaintiff in this appeal is not a New York resident. He is a Norwegian. The defendants are North Carolinians, the automobile accident occurred in North Carolina, the insurance carrier is an Ohio insurance company and the insurance policy covering the defendants was issued in North Carolina. The only New York contact is the rather tenuous fact that the defendants' insurance company is authorized to do business in New York.

A close reading of *Seider* and *Simpson* and the commentaries on those cases shows that the New York residency is a crucial consideration (see, e.g., Prof. David D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B, 1967 Pocket Part, pp. 13-21, 23-31; 67 Col. L. Rev. 550 [1967] [Garnishment of Intangibles, etc.]). Yet we must be mindful of the fact that the accident of a plaintiff's residence does not bear directly on the substance of a court's jurisdiction and power over

a defendant, particularly when an in rem concept is involved. When the *res* is here in New York, that is the jurisdictional fulcrum.

The conclusion of Chief Judge Fuld's analysis in *Simpson* is that "where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, it has a substantial and continuing relation with the controversy" and "[f]or jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such *factors* loom large" (emphasis added). Judge Breitel, in concurring, anticipated the danger that the present appeal exemplifies: "On the basis of the rule in the *Seider* case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State". Judge Bergan concurred in this opinion. Judge Burke dissented in *Simpson*, as he did in *Seider*, and he spelled out anew that a state must have a sufficient interest in an insurance relationship or in an accident in order to justify the interference of its courts in an adjudication (see, *Watson* v. *Employers Liability Assur. Corp.*, 348 U. S. 66). Neither consideration is present in this appeal. Judge Burke concluded as follows:

> "*Seider* may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, *Seider* would seem to allow) an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent, only if we may

> say to such persons that no matter which state or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character."

The commentary attacks upon *Seider* are amply set forth in the opinions in *Simpson*. However, quickly following the decision in *Simpson*, Professor Siegel had more to say:

> "This doctrine, which determines whether a state may exercise jurisdiction based on the 'contacts' that the state has with the case, evolved and has been applied in in personam cases, notably those involving 'longarm' statutes such as CPLR 302. It has not been accorded a place in in rem cases up to now but, for the purpose of determining the constitutionality of what Seider seeks to do, it appears to have equal relevance.
>
> "The very fact that this 'contacts' doctrine, born in in personam cases, seems obviously in point in the Seider case, strongly corroborates the argument so frequently made: that Seider is merely an in personam case parading in an in rem disguise. * * *
>
> "As Judge Burke further indicated, Seider cases are being brought even where the plaintiff is not a New York resident, leaving the mere fact of the insurers' local office as the exclusive basis for the exercise of jurisdiction. Citing one such case [our present appeal], in which a Norwegian brought suit in New York against a North Carolinian for an accident occurring in, and relative to an insurance policy issued in, North Carolina, Judge Burke said:
>
> 'What purpose allowing [this] suit to be brought here, other than possibly increasing [plaintiff's] hope for damage award, is beyond me.'

> "The issue may ultimately turn upon forum non conveniens, a doctrine which determines what cases, involving nonresidents, the state courts will or will not accept." ("Simpson Upholds Seider—Problems for Both Sides" by Prof. David D. Siegel, N. Y. Law Journal [Jan. 23, 24 and 25, 1968], Jan. 23, 1968, p. 4, col 6).

Although the defendants have been understandably reticent about advancing theories like forum non conveniens, public policy and lack of sufficient jurisdictional contacts (all out of fear of unintentionally effecting an in personam jurisdictional base), we cannot and should not close our eyes to the realties of the facts before us in this case.

The plaintiff is a nonresident. The solitary nexus for the New York courts is the fact that the defendants' insurance carrier is a foreign corporation authorized to do business in New York. Under no circumstances could these facts support an exercise of jurisdiction by the New York courts without adversely affecting the administration of justice in this State by an influx here of unwanted and unnecessary lawsuits (*Pietraroia* v. *New Jersey & H. R. Ry. & Ferry Co.*, 197 N. Y. 434). We are obliged under the circumstances of this case, where no special considerations are advanced, to dwell on the aptness of the forum non conveniens doctrine. Essentially, it is the convenience of our courts, not that of the litigants, and the practical ramifications which determine the acceptance or rejection of the doctrine in a particular case (*Williams* v. *Seaboard Air Line R. R. Co.*, 9 A D 2d 268; see, also, *Gilchrist* v. *Trans-Canada Air Lines*, 27 A D 2d 524). For this compelling reason, and also because we

believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (*Hanson* v. *Denckla*, 357 U. S. 235; see, *Lefcourt* v. *Sea Crest Hotel & Motor Inn*, 54 Misc 2d 376), the order should be reversed, on the law, without costs, and the defendants' motion granted.

BRENNAN, RABIN, BENJAMIN and MARTUSCELLO, JJ., concur.

MAR 30 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant,

against

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor, and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY,

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Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

Appellees, State officers Nelson A. Rockefeller, Louis J. Lefkowitz and Henry Root Stern, Jr., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

States, move to dismiss the appeal from the order of the statutory three-judge District Court below on the ground that the appeal is not within the jurisdiction of this court.

Opinion Below

The opinion of the statutory court dated March 17, 1967, is reported at 265 F. Supp. 556 (S.D.N.Y.) and appears as appendix A to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1253 and 2101(6).

Statutes Involved

28 U.S.C. 2281

N. Y. CPLR §§ 314, 5201, 6202, 6214

R. 320, R. 3211

Question Presented

Does this Court have jurisdiction to hear a direct appeal pursuant to 28 U.S.C. 1253 where the three-judge Court below properly found that absent any basis for injunctive relief that Court lost all authority and power as a statutory Court?

Statement

This is a direct appeal from an order entered in the United States District Court for the Southern District of New York on March 17, 1967 by a statutory three-judge court which dissolved itself and dismissed the portions of

appellant's complaint seeking injunctive relief, interlocutory and final, against the appellee state officials.

The appellant commenced this action below seeking an interlocutory injunction to restrain the enforcement, operation or execution of Sections 5201, 6202 and Rule 320 of the New York Civil Practice Law and Rules on the ground that these sections, constituting provisions relating to attachment and garnishment of property, as interpreted and applied by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312,* were repugnant to the Fourteenth Amendment to the Constitution of the United States.

On October 26, 1966 the single district judge denied appellant's application for a temporary restraining order but found that since the substantiality of the constitutional claims raised was in doubt, he convened a three-judge court. 28 U.S.C. 2281.

This action commenced by appellant arises out of two underlying negligence actions instituted in the Supreme Court of the State of New York ostensibly in accordance with the procedures ratified by the New York Court of Appeals in *Seider* v. *Roth, supra.*

In *Seider*, a New York resident was injured in a three-car collision in Vermont and brought suit in New York against one Lemiux, a resident of Quebec. Since no basis for personal jurisdiction over Lemiux existed in New York, plaintiff Seider attached the contractual obligations owed to the defendant by his liability insurer, Hartford Accident and Indemnity Company. Hartford, a Connecticut corporation, issued the policy in Canada but does business in New York. On an interlocutory appeal of the trial court's refusal to vacate the warrant of attachment the New York Court of Appeals affirmed.

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* See also *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, —— N. E. 2d ——; *Victor* v. *Lyon Associates*, 21 N. Y. 2d 695, —— N. E. 2d ——.

The New York Court of Appeals concluded that the contractual rights of a non-resident insured defendant under a policy of liability insurance issued by an insurer doing business in New York constitute a "debt" owed to the nonresident insured defendant which is subject to attachment, and when attached, gives the Court *in rem* jurisdiction over the defendant. Such policy required the insurer, among other things, to defend its insured in any automobile negligence action, and if judgment be rendered against the insured, to indemnify him therefor. Thus, the Court observed, as soon as an accident occurs, there is imposed upon the insurer a contractual obligation which should be considered a debt within the meaning of New York Civil Practice Law and Rules, Sections 5201 and 6202.

The underlying *Vaage* negligence action herein involves an automobile accident which occurred on December 31, 1963 in the State of North Carolina. Appellant's insureds are residents of North Carolina, where the policy of automobile liability insurance was issued and the injured plaintiff is a resident of Norway. An order of attachment was issued by the Supreme Court, Queens County upon the interest of appellant's insureds under the policy and the insureds were subsequently served in North Carolina. The insureds instructed appellant that they were unwilling to subject themselves to a trial in New York.*

A similar attachment and levy was effected in the *Monaco* action herein which arose out of an accident occurring in Pennsylvania where appellant's insured resides and where the policy of automobile liability insurance was issued. The injured plaintiffs, the Monacos, are residents of the State of New York.

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* In contradistinction to *Seider* v. *Roth, supra, Simpson* v. *Loehmann, supra, Victor* v. *Lyon Associates, supra* and in the *Monaco* action herein, only in the *Vaage* action were both the plaintiff and the insureds non-residents of New York. On March 6, 1967 the Appellate Division of the New York Supreme Court reversed the New York Supreme Court, Queens County and *vacated* the order of attachment and levy thereunder. *Vaage* v. *Lewis*, —— A. D. 2d —— (2d Dept.).

The statutory Court below held, without entering into any analysis of appellant's contentions on the merits, that since the complaint presented no basis for appellant's request for injunctive relief, there being no state agency or officer before that Court "to be sensibly or effectively enjoined", the three-judge court must be dissolved and the appellant's remaining claims were accordingly left for resolution by a single district judge. 265 F. Supp. 556 at 562-563.

On April 17, 1967 the appellant served and simultaneously filed, notices of appeal from the order below both to this Court and to the United States Court of Appeals for the Second Circuit.

ARGUMENT

Since this case was not one for which a statutory court is prescribed by 28 U.S.C. 2281, no direct appeal lies to this Court.

Title 28 U.S.C. 1253 permits a direct appeal to this Court only if the case was "required . . . to be heard and determined by a district court of three judges." *Moody* v. *Flowers,* 387 U. S. 97, 101; *United States* v. *Georgia Public Service Commission,* 371 U. S. 285, 287. Accordingly the threshold question here is whether the three-judge court below was properly convened. *Moody* v. *Flowers, supra* at 99.

Title 28 U.S.C. 2281 requires the convening of a three-judge court "in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional." *Swift & Co.* v. *Wickham,* 382 U. S. 111, 120. As the Court below properly found, "not even the . . . [appellant] maintain[s] that the Governor, the Superintendent of Insurance or the Attorney General have acted or can act to affect the rights asserted in the complaints before us." 265 F. Supp. 556 at 562. Only the several

sheriffs are seriously alleged in the complaint to be the state officers sought to be enjoined.*

Assuming, without conceding, that the sheriffs here are deemed by this Court to be state officers for the purposes of this action (*Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 93) regard must be made "to the function of the officer who is sought to be restrained." *Spielman Motor Co.* v. *Dodge, supra* at 94; *Gilmore* v. *James*, 274 F. Supp. 75, 84 (N. D. Tex.), *aff'd* 389 U. S. 572.

It is clear, and the Court below properly found, that the sheriffs act simply as ministerial officers in the disputed attachment proceedings and only by virtue of a specific order of a New York Court. See N. Y. CPLR § 6214. Accordingly the Court below held as noted above, that "there is no state agency or officer or Court to be sensibly or effectively enjoined so as to afford the . . . [appellant] the relief for which they pray. 265 F. Supp. 556 at 562-3.

This Court's opinion in *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, supports that conclusion. In *Oklahoma Gas Co.* a direct appeal was taken to this Court from a statutory Court which dismissed the cause, as here, for want of equity jurisdiction. The suit was commenced by Oklahoma Gas Company against Wilson & Company, Inc., the State Corporation Commission and the Attorney General of the State, to enjoin enforcement of the Commission's order. The order was assailed as an infringement of the due process clause and contract clauses of the United States Constitution. As here, the appellants

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* At no point in this action have the Governor, the Superintendent of Insurance or the State Attorney General conceded that they represent the several sheriffs named here as defendants-appellees. Indeed, the Sheriff of New York County was represented by his own counsel below. See *People ex rel. Fallon* v. *Wright*, 150 N. Y. 444, 448, 44 N. E. 1036, holding that the sheriff is generally classified as a local officer although that office is organized under the authority of the State.

requested this Court to sustain the equity jurisdiction of the three-judge court upon the ground that they were without adequate legal remedy to protect themselves from the force of the alleged unconstitutional order of the Commission.

This Court in *Oklahoma Gas Co., supra,* pertinently observed

> "The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers and that the only matter in controversy was the right of Wilson & Company to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266 [Predecessor statute of 28 U.S.C. 2281]." *id.* at 391.

In the same fashion here there is no basis for equitable relief against the sheriffs. As the Court below noted, and as the complaint here reflects, essentially appellant seeks only a declaratory judgment "settling and declaring" the rights and obligations under the appellant's insurance contracts.* 265 F. Supp. 556 at 559. The statutory court accordingly was improperly convened.

Similarly, in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, this Court found that the requirements of the three-judge court statute "is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." See also *Moody* v. *Flowers,* 387 U. S. 97, 102.

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* *i.e.* a declaratory judgment that appellant is authorized to enter a general appearance in the New York Courts on behalf of its non-resident policyholders; an order enjoining appellant's policyholders from taking any other and independent action in respect to the personal injury claims asserted against them. 265 F. Supp. 556 at 559.

In *Wilentz, supra,* the appellee commenced a suit in equity in the District Court seeking a declaratory decree against the validity of certain provisions of the New Jersey Municipal Finance Commission and an injunction restraining state and municipal officers from acting pursuant to the Commission Act on the ground that contract obligations were unconstitutionally impaired. In particular the complaint in *Wilentz* assailed as unconstitutional those portions of the statute prescribing a stay of suit or execution against any municipality and coterminous school district in which the commission was functioning. The only state officers sought to be enjoined were members of the Commission. The stay prescribed by the statute became effective whenever the state Supreme Court found that the municipality was unable to meet its obligations. This Court critically noted

> "The order of the Supreme Court promulgating its finding is the decisive action which calls the stay provisions into operation, and when that action is taken the statute becomes self-executing. The Commission is thus without power to grant or withhold a stay, and as the form of the decree, already noted, shows, there is no occasion to enjoin action by the Commission as the means of preventing operation of the stay provisions." *Id.* at 580.

In this case, as in *Wilentz,* it is not the state officers whose actions are the effective means of enforcing or executing the challenged statute, but rather a specific order of attachment by a New York Court.*

This Court has on numerous occasions seen fit to describe the three-judge court statute as an extraordinary

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* *Spielman Motor Co.* v. *Dodge, supra,* is not to the contrary. In *Spielman* this Court found that a New York District Attorney although regarded as a local officer was deemed to be a state officer for purposes of the three-judge court statute because as a prosecuting attorney he acts for the entire state and *initiates* proceedings against violators of state statutes. *id.* at 94-95.

procedure and one that is not to be viewed "as a measure of broad social policy to be construed with great liberality but as an enactment technical in the strict sense of the terms and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251. See also *Swift & Co.* v. *Wickham*, 382 U. S. 111, 124. The appellant has by the expedient of simply naming as nominal parties state officers, against whom no equitable relief may be obtained, critically failed to bring this action within the purview of 28 U.S.C. 2281 and accordingly this Court has no jurisdiction to hear this direct appeal.

CONCLUSION

The appellees herein respectfully pray that the appeal from the order below be dismissed.

Dated: New York, New York, March 28, 1968.

Respectfully submitted,

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SUPREME COURT, U. S.

APR 18 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY, *Appella*

v.

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York, *Appellees.*

Appeal From the United States District Court for the Southern District of New York

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY, *Appellant*,

v.

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York, *Appellees*.

Appeal From the United States District Court for the Southern District of New York

---

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

The pending motion to dismiss the instant appeal, made solely on behalf of the appellees Governor, Attorney General and Superintendent of Insurance of the State of New York, is founded upon the erroneous analysis of the lower

court that since none of the persons named as defendants were impairing Nationwide's constitutional rights, injunctive relief was futile. Thus, the movant contends that the Sheriffs who, under the statutes in question, are the only persons authorized to execute orders of attachment and levy upon property are mere "ministerial officers", having no discretion in the manner of executing such orders, and that it is really the order of attachment itself which offends the appellant's rights. This being so he apparently continues, the appellant is completely without an effective remedy in this instance, because it would be compelled to institute separate federal court actions with respect to each order of attachment, as and when issued, and to request the federal court to enjoin the operation of each order. Obviously, this would be tantamount to enjoining the prosecution of pending state court actions which the federal courts are, as a general rule, precluded from doing. 28 USC § 2283.

But this analysis disregards the actual attachment mechanism. The order of attachment merely *authorizes and directs* the Sheriff to make a levy. It does *not* limit or restrict him as to the property upon which he is to make the levy; that is accomplished by the New York statute which defines the "property" and "debts" which may be attached, as such terms may be interpreted and construed from time to time by the courts of New York, such as was done in the *Seider* case in holding that automobile liability policies were property which *could* be attached by sheriffs. But while sheriffs may now levy upon such policies, they are by no means compelled to do so. In the language of the statute (CPLR § 6214, p. B-6)*: "The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant . . .". More-

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* Reference to pages of the Appendix to the Jurisdictional Statement.

over, his levy cannot be of unlimited scope, but only upon so much of the property of the defendant as will satisfy the plaintiff's demand, and excess property can be released. *Buxbaum* v. *Assicurazioni Generali,* 175 Misc. 785, 25 N.Y. Supp. 2d 357. Thus, it is the sheriff's choice—and his choice alone—of attaching an automobile policy of Nation-wide which results in an invasion of its constitutional rights. Sheriffs are properly to be regarded as "state officers" in this instance; they are the "effective means of the enforcement or execution of the challenged statute"; and the instant case was properly before the three-judge court, and before this Court on appeal. *Moody* v. *Flowers,* 387 U.S. 97, 87 S. Ct. 1544, 18 L.Ed. 2d 643. As explained more fully in the Jurisdictional Statement (p. 14), although the sheriffs are admittedly the primary parties in interest, the Governor, Attorney General and Superintendent of Insurance of New York were joined as parties defendant as representative of the sheriffs of the 57 counties of the State of New York, and to eliminate the necessity of having to serve each of the sheriffs personally. Moreover, as there explained, the Governor of the State of New York possesses the power to remove all sheriffs of the State of New York, and thus he could, through this removal power, insure the effectiveness of a court order enjoining sheriffs from levying upon automobile liability policies. The Attorney General, of course, while not an indispensable party to this action, is the chief law officer of the State of New York authorized to issue legal opinions as to the duties of public officers throughout the State, including sheriffs, and he could, through the performance of this function, insure the implementation of the court's injunction. For this reason, and because he is required to be served with all papers in the three-judge proceeding, he was joined as a defendant. Finally, the Superintendent of Insurance was joined because of his concern with and responsibility for the regulation of the business of insurance in the State of New York.

As noted above, none of the other parties to this proceeding, including the Sheriff of the City of New York, where a substantial portion of the attachment "business" exists, has chosen to move to dismiss the instant appeal. If this Court believes that the Governor, Attorney General and the Superintendent of Insurance are not proper parties to this proceeding, it could, it is submitted, dismiss such appeal as against these parties, but continue it as against all other parties.

CONCLUSION

The motion to dismiss the appeal should be denied in all respects, or in the alternative, dismissed as against the Governor, Attorney General and Superintendent of Insurance and continued as against all other parties.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NATIONWIDE MUTUAL INS. CO. *v.* VAAGE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1177. Decided April 22, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.